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THE

LAW OF RIPARIAN RIGHTS,

ALLUVION AND FISHERY.

WITH INTRODUCTORY LECTURES

ON

THE RIGHTS OF LITTORAL STATES OVER THE OPEN SEA, TERRITORIAL WATERS, BAYS, &c., AND THE RIGHTS OF THE CROWN AND THE LITTORAL PROPRIETORS RESPECTIVELY OVER THE FORESHORE OF THE SEA.

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BY

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Division of the subject—Essential nature of right of fishery—Enumeration and definition of the different kinds of right of fishery recognised by English law—Distinction between each of these kinds—A I. Fishery in the high sea—II. Fishery in the territorial waters—III (*a*). Fishery over the foreshore of the sea, and in tidal waters—Right of fishery in such waters primâ facie vested in the public—Extent of the right—Mode in which this right may lawfully be exercised—Foundation of the right—Discussion of authorities—Effect of alteration of the channel of a tidal navigable river upon the public right of fishery—Prerogative of the Crown to appropriate or grant several fisheries in tidal waters anterior to Magna Charta—Effect of Magna Charta on such prerogative—In what cases may a claim by a private individual to a several fishery in tidal waters, be valid?—Reversion to the Crown of a several fishery in tidal waters by forfeiture or otherwise—Modes in which a right to a several fishery in tidal waters may be claimed by a subject—Nature of proof requisite in each case—Kinds of several fishery in tidal waters—Nature of each kind of several fishery—Does the right to a several fishery in tidal waters raise any presumption as to the ownership of the subjacent soil?—Effect of shifting of the channel of a tidal navigable river upon the ownership of a several fishery—*Mayor of Carlisle* v. *Graham*—Free fishery in tidal waters—Restrictions upon the enjoyment of a several fishery or a public right of fishery in tidal waters—Fishery in non-tidal rivers and streams—Right of fishery in such waters primâ facie vested in the riparian owners—Foundation and nature of the right—Enumeration of the different kinds of right of fishery in such waters—Ambiguity of the term 'several fishery,' when applied to non-tidal waters—Modes in which a several fishery in such waters may be created—Does the right to a several fishery in non-tidal waters raise any presumption as to the ownership of the subjacent soil?—Several fishery in one, subject to a limited right in another—Free fishery in non-tidal waters—Franchise fishery in non-tidal waters—Effect of shifting of the channel of a non-tidal river upon the right of fishery—*Foster* v. *Wright*—Restrictions upon the exercise of the right of fishery in those non-tidal rivers that are navigable—Obstruction to the passage of fish. 345

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LECTURE XIV.

FISHERY.—(*Continued.*)

III (b). Fishery in navigable rivers—Under Roman law, right to fish in perennial rivers common to the public,—Appropriation by the sovereigns in feudal times of the right to fish in navigable rivers—Right of the public to fish in navigable rivers rehabilitated in France by the Code Napoleon—Right also recognised in some of the states in America—In India, right of fishing in navigable rivers primâ facie belongs to the public—Mode of enjoyment of such right—Exclusive fishery claimable by private individuals by grant from Government or by prescription—Nature of evidence requisite to prove acquisition of such exclusive right—Whether exclusive right of fishery in a navigable river imports a right to the subjacent soil—Effect of shifting of, or of any other change in, the channel of a navigable river upon the exclusive or the public right of fishery in the river—Course of decisions upon this topic in Bengal—Remarks—Fishery in non-navigable rivers or streams—Right of fishing in such rivers or streams primâ facie vested in the owner of the subjacent soil—Distinction between territorial and incorporeal fishery in non-navigable streams—Modes of acquisition of incorporeal fishery—To whom does the right of fishery in non-navigable streams flowing between two estates, primâ facie belong?—Whether exclusive right of fishery in a non-navigable stream imports a right to the subjacent soil—Modes of determining the right to the soil under different circumstances—Right of the grantee of the entire julkur of a pergunnah—Obstruction to the passage of fish—Fishery in lakes and ponds—Right of fishing in small lakes, ponds, &c. primâ facie belongs to him in whose lands they are situated—Right of fishing in large non-tidal navigable lakes, under English law—Under American law—Right of fishing in lakes, ponds, &c. generally, according to Anglo-Indian law—Sums annually payable under a lease of a fishery, whether rent or not—Right of occupancy in respect of the julkur of a stream, &c.

B. Topics relating to rights of fishery in general—Whether a right to compensation exists for loss of right of fishery, when subjacent soil is acquired for public purposes—Whether the English Prescription Act applies to right of fishery in gross—Provisions of the Indian Limitation Act and the Easements Act respectively regarding right of fishery in gross—A fluctuating body of inhabitants of a vill, parish, or a borough cannot by custom claim a right—First reason for the rule—Second reason—Comments on the second reason—*Goodman* v. *Mayor of Saltash*—*Lutchmiput Singh* v. *Sadaulla Nashayo.*

C. Remedies for disturbance of rights of fishery—(i) Civil actions—(ii) Criminal proceedings—Roman law regarding ferae naturae—General principles of law regarding the same topic—Provisions of the English Common law—*Blades* v. *Higgs*—Liability of a trespasser for capture of ferae naturae—24 & 25 Vict. c. 96, s. 24—Summary of the decisions upon the section—Anglo-Indian law regarding ferae naturae—Cases in which capture of fish does not constitute any offence under the Indian Penal Code—Act II of 1889 (B. C.)—Section 145 of the Criminal Procedure Code, how far applicable to rights of fishery. 368

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LECTURE I.

THE SEA, TERRITORIAL WATERS, BAYS, GULFS AND ESTUARIES.

Introduction—Rights of littoral states over bays, gulfs, estuaries, territorial waters and the main ocean—Respective provinces of municipal and international law as regards rights over waters—Under Roman law, sea common to all—In ancient times, sea open to universal depredation—In later ages exclusive sovereignty over several portions of the high seas claimed by different states—Reason assigned by Grotius for the doctrine of freedom of the seas—By Puffendorf—By Bynkershoek—By Vattel—Main ocean common to all nations for navigation and fishery—Exclusive rights of navigation and fishery acquirable by treaty—Doctrine of exterritoriality of ships—Distinction between the immunities of private and public vessels in ports and territorial waters of foreign states—Bed of the sea common to all—Portions of bed of the sea prescriptible—I. Extent of 'territorial water'—Reasons for appropriation of adjoining seas—Bynkershoek first to suggest range of cannon-shot from shore as limit—Three miles from shore, the limit of 'territorial water' according to modern international law—Ambiguity of the expression 'territorial water'—II. Sovereignty and dominion of a littoral state over its territorial water—Summary of the purposes for which such sovereignty and dominion may be exercised—Sovereignty and dominion of England over the narrow seas—Selden's opinion—Lord Hale's doctrine—(*a*) Nature of sovereignty over territorial water—Jurisdiction over foreign ships in such water now regulated by various treaties between England and other states—Nature of these treaties—17 and 18 Vict. c. 104—*Rolet* v. *The Queen*—*The Leda*—*General Iron Screw Colliery Co.* v. *Schurmanns*—Jurisdiction of British Courts over foreigners in foreign ships in territorial water of Great Britain—Discussion of cognate topics by Courts in India—*Reg.* v. *Irvine*—*Reg.* v. *Elmstone*—*Reg.* v. *Kastya Rama*—37 and 38 Vict. c. 27, Courts' (Colonial) Jurisdiction Act—Effect of that statute on some of the Indian cases—*The 'Franconia' case*—41 and 42 Vict. c. 73, Territorial Waters Jurisdiction Act—Jurisdiction over offences committed by one foreigner upon another on board foreign ships passing through territorial water—(*b*) Nature of dominion over territorial water—Open to peaceful navigation by all nations, but adjoining littoral state exclusive owner of fishery—Reasons generally adduced for asserting ownership over the bed of territorial water—Reasons assigned by Lord Hale—Dicta in *Blundell* v. *Catterall*, *King* v. *Lord Yarborough*, and *Benest* v. *Pipon* influenced by the old doctrine of the narrow seas—*Gammell* v. *Commissioners of Woods and Forests*—*Whitstable Free Fishers* v. *Gann*—Award of Sir John Pattoson and the Cornwall Submarine Mines Act (21 and 22 Vict. c. 109) as to ownership of mines beyond low-water mark of Duchy of Cornwall—Law in India as to ownership of bed of territorial water—Observations in *Reg.* v. *Kastya Rama*—*Babun Mayacha* v. *Nagu Shravucha*—These observations need reconsideration—Littoral states entitled,

for maintaining lighthouses &c., to levy tolls on vessels passing through or casting anchor in territorial water—Such tolls not leviable without quid pro quo—III. Bays, gulfs and estuaries—Test for determining their territorial character—King's Chambers, what—*Reg.* v. *Cunningham*—Observations by the Privy Council with regard to *Conception Bay* on the east of Newfoundland—Test deducible from the cases—Territorial bays, &c. subject to the municipal law of adjoining state—Ownership of the soil of their bed—In England bed of districtus maris alienable by Crown before 1 Anne, c. 7 subject to ius publicum—In India alienable by Government, probably, without any such restriction.

Before I proceed to deal with the immediate subject of the present course of lectures, namely, the principles and the rules of law which regulate the rights of riparian and littoral proprietors in streams, rivers and arms of the sea, I shall endeavour to give you a short sketch of that interesting, though somewhat difficult, branch of law which relates to the rights of littoral states over bays, gulfs, estuaries, territorial waters and the main ocean.

Some acquaintance with this subject, if not indispensable to the student or the practical lawyer in this country, may yet perhaps be of occasional utility to both. Questions, though no doubt in some rare instances only, have been raised and discussed in the Courts in India, which, however, ultimately depend for their solution upon the nature of the rights of littoral states over their adjoining seaboard.

It is at the present day a fundamental postulate of international jurisprudence,—whatever the history of the past stages of the doctrine may be,[1]—that the sovereignty of a state is territorial, that a nation cannot by its laws directly bind property which is beyond the limits of its territory, nor directly control persons who are not resident therein.[2] It follows as a necessary consequence from this that, the municipal law of a state is competent to deal with the riparian and littoral rights of its subjects over such waters alone as are encompassed by its own territorial bounds; while an investigation of the rights of the various maritime states over those waters that are outside their respective territorial limits falls within the domain of international law. But though the respective provinces of municipal and international law with regard to rights over waters may thus seem to be sharply defined and exclusive of one another,

[1] Maine's Ancient Law (4th ed.), 101—112.

[2] Rodenburg, De Statutis, t. 1. c. 3. § 1; Wheaton's Int. Law (Boyd's 2nd ed.), 105—106; 1 Phillimore's Int. Law (3rd ed.), 216; § 145; 1 Kent's Comm., § 457; 1 Twiss's Law of Nations (2nd ed.), 258; § 158; Story's Conflict of Laws, § 539; Hall's Int. Law (3rd ed.), 50—55; § 10; Maine's Lect. on Int. Law, 56.

the consensus of civilized nations, which forms the main basis of modern international law, has appropriated to every littoral state a zone of the high sea, known as its 'territorial water,' where the municipal law of that state as well as international law have concurrent operation.

The Main Ocean.—Before I enter into the subject of territorial water, which, on account of its ever-increasing practical importance, demands a much larger share of your attention, I propose to make a few remarks with regard to the rights of states, whether littoral or not, over such parts of the open sea as fall within the exclusive operation of international law.

The Roman Institutional writers laid down that, by the law of nature, the sea was common to all: Et quidem naturali iure communia sunt omnium haec, aer et aqua profluens et mare et per hoc littora maris.[1] Differences of opinion prevailed among the ancient commentators as to the precise signification to be attached to the expression 'res communes'; some maintained, not perhaps without considerable plausibility, that the community denoted by it was intended to be confined to the Roman people, but the more approved and generally accepted view was that it extended to mankind in general.[2]

This doctrine of community of the sea, enunciated in the writings of the jurisconsults, is undeniably the source to which its counterpart in modern international law may ultimately be traced, but it may perhaps be given to doubt, whether that doctrine, in its inception, was not a mere speculative tenet of the Roman lawyers, deduced from the vague principles of a supposed law of nature, rather than a description of the actual condition of the sea in those primitive ages. Indeed, Sir Henry Maine has hazarded the opinion that, the sea at first was common only in the sense of being universally open to depredation.[3]

In later times, however, nations and states, tempted by the supremacy of their power, and the magnitude of their maritime resources, but actuated principally by a beneficent desire to rid the seas of pirates and filibusterers, advanced unbounded claims to the sovereignty and dominion of several portions of the high seas. Spain and Portugal, at different epochs, claimed exclusive right, founded upon the titles of

[1] Inst. i 1. 1; Dig. i. 8. 2. 1.

[2] Noodt, Probabilia Iuris, t. 1. cc. 7, 8; Grotius, de Iur. Bell. et Pac. lib. ii. c. 3, § 9, 1 (cf. Barbeyrac's note 5). Cf. Dig. xliii. 8. 3. 1; J. Voet. Comm. ad Pand. lib. i. t. 8. § 2.

[3] Maine's Lect. on Int. Law, 76.

previous discovery, and Papal grants, to the navigation, commerce and fisheries of the Atlantic and Pacific Oceans.[1] England asserted the right of sovereignty over the so-called British Seas.[2] Venice laid claim to the Adriatic, Genoa to the Ligurian sea, and Denmark to a portion of the North sea.[3] But these extravagant pretensions, always unfounded, long since gave way to the influence of reason and common sense. Grotius, Puffendorf, Bynkershoek and Vattel, and the succeeding publicists all uniformly asserted the absolute freedom of the high seas. Grotius, the most authoritative of the founders of international law, and probably the most reverenced of all the writers on the subject, maintained the doctrine on the ground that the sea like the air is so immense, that it is sufficient for the purposes of all mankind.[4] Puffendorf, his disciple, rested his opinion on the ground that the exclusive dominion of

[1] 1 Phillimore's Int. Law (3rd ed.), 247; Wheaton's Int. Law (Boyd's 2nd ed.), 221; § 166; Hall's Int. Law (3rd ed.), 141; § 40.

[2] Selden in his Mare Clausum asserted the sovereignty of the King of England as far as the shores of Norway. See Hargrave's notes to Co. Litt. 107 *b.*, which is a summary of the 1 ch. 2nd Book of Selden's Mare Clausum Lord Hale supports Selden in his treatise De Iure Maris. p. 1, c. 4; Hargrave's Law Tracts, 10, where he says:—"The narrow sea, adjoining to the coast of England is part of the waste and demesnes and dominions of the King of England, whether it be within the body of any county or not. This is abundantly proved by that learned treatise of Master Selden called Mare Clausum; and therefore I shall say nothing thereon, but refer the reader there. In this sea the King of England hath a double right, *viz.*, a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership."

The British seas, sometimes called the Four Seas are those which encompass the coasts of England, Scotland and Ireland. They are—1, The Atlantic, which washes the western shore of Ireland, and which comprises, as it were, by way of subdivision, the Irish Sea or St. George's Channel, and the Scottish Sea to the north-west; 2, The North Sea on the coast of Scotland; 3, The German Ocean on the east; and 4, The British Channel on the south. Co. Litt., 107*a*, note 7. The jurisdiction of the King as lord and sovereign of the sea, has been defined, with respect to the Channel, to extend between England and France, and to the middle of the sea between England and Spain. Sir John Constable's case, 3 Leon. 73; 5 Com. Dig. 102. With respect to the Western and Northern Oceans, there was said to be more uncertainty as to the limits of British dominion. Selden contended for the fullest exercise of dominion over the British Seas, both as to the passage through and fishing in them; while Sir Philip Medows suggested more confined rights, as to exclude all foreign ships of war from passing upon any of the seas of England without special license, to have the sole marine jurisdiction within those seas, and also an appropriate fishery. Woolrych on Waters, (2nd ed.), 5.

[3] Bynkershoek, Dissertatio de Dominio Maris, cc. 4, 5, 6, & 7; Craig's Ius Feudale lib. i. t. 15. § 10; Hall's Int. Law (3rd ed.), 139-140; § 40; *Reg.* v. *Keyn*, 2 Ex. D. 174, 175.

[4] De Iur. Bell. et Pac. lib. ii. c. 2. § 3, 1.

the sea by any single nation is not only unprofitable, but also manifestly unjust.[1] Bynkershoek, however, placed the doctrine upon a firmer and a more practical basis. He affirmed it upon the ground that the sea is incapable of continuous occupation and insusceptible of permanent appropriation.[2] But Vattel supported the doctrine upon all these three grounds, and also upon a fourth, namely, that the use of the sea is innocuous, that he who navigates or fishes in the open sea, does injury to no one.[3]

Whatever be the reasons upon which the rule ought really to rest, it is perhaps immaterial for us at the present day to enquire. It may be safely laid down as an unquestionable proposition of modern international jurisprudence that the main ocean for the purposes of navigation and fishery—probably the only uses which the main ocean admits of—is common to all the nations.[4] The subjects of all nations meet there, in time of peace, on a footing of entire equality and independence.

It is possible, however, that a state may acquire exclusive rights of navigation and fishing over portions of the open sea as against another state, by virtue of the specific provisions of a treaty.[5]

A ship navigating the main ocean remains subject to the jurisdiction of the state whose flag it carries. This is called the exterritoriality of ships, a doctrine by which the dominion of a state is artificially extended over its ships in the high sea in order that it may exercise jurisdiction over them.[6] By some writers on international law a ship

[1] De Iur. Nat. et Gent. lib. iv. c. 5. § 9.

[2] Dissertatio de Dominio Maris, c. 3. Totum, qua patet, mare non minus iure naturali cedebat occupanti, quam terra quævis, aut terræ mare proximum. Sed difficilior occupatio, difficilima possessio; utraque tamen necessaria ad asserendum dominium, iure videlicet gentium.

[3] Law of Nations, Bk. i. c. 23. § 281.

[4] Wheaton's Int Law (Boyd's 2nd ed.), 251; § 187 ad fin; 1 Phillimore's Int. Law (3rd ed.), 247-248; § 172; 1 Twiss' Law of Nations (2nd ed), 284; § 172; Kent's Int. Law (Abdy's ed.), 97; Maine's Lect. on Int. Law, 78.

[5] Grotius, de Iur. Bell. et Pac. lib. ii. c. 3. § 15, 1 & 2; Vattel's Law of Nations, Bk. i. c. 23 § 284; Wheaton's Int. Law (Boyd's 2nd ed.), 250-251; § 186 ad fin.

[6] Grotius, de Iur. Bell. et Pac. lib. ii. c. 3. § 13; Vattel's Law of Nations, Bk. i. c. 19. § 216; Wheaton's Int. Law (Lawrence's 2nd ed.), 208, Pt. ii. c. 2. § 10; Kent's Int. Law (Abdy's ed.), 97-98. Hall's Int. Law (3rd ed.) 245; § 76. This right of jurisdiction of a state is really founded upon its ownership of the ship as property in a place where no local jurisdiction exists, Hall's Int. Law (3rd ed.), 250; § 77.

on the ocean is regarded as a floating portion of the territority of the state to which it belongs. But this, after all, is a mere metaphor, and too much care cannot be taken when it is made the starting point for new inferences. If the figure represented accurately the international status of the ship, one consequence of it would be that she ought to be inviolable at all times and under all circumstances, but we know it to be an admitted principle of international law that in time of war she can be seized and condemned by belligerent states for carriage of contraband or breach of blockade.[1] However that may be, it is certain that all persons on board a vessel in the main occean, whether subjects or foreigners, are bound to obey the law of the state whose flag it sails under, as though they were actually on its territory on land.[2] When a private ship enters the port or (what I shall presently define) the territorial water of another independent state, it becomes subject, in the one case absolutely, and in the other for some purposes only, to the jurisdiction, and consequently to the municipal law, of that state.[3] But ships of war or other public vessels enjoy absolute immunity from the jurisdiction of foreign states even when they lie in the harbours or territorial waters of such states.[4]

If, as I stated just now, the high sea is common to all nations for navigation and fishery, it is evident that the soil of its bed cannot be the exclusive property of any single state, except, however, in those rare cases where a portion of it has been beneficially occupied for a sufficient

[1] Hall's Int. Law (3rd ed.), 244-249; § 76; Maine's Lect. on Int. Law, 86.

[2] 1 Twiss' Law of Nations (2nd ed.), 285-286; § 173. Cf. Judgment of Sir Robert Phillimore in *Reg.* v. *Keyn*, 2 Ex. D. 63.

[3] Wheaton's Int. Law (Boyd's 2nd ed.), 132 § 101; 1 Twiss' Law of Nations (2nd ed.), 272-273; § 166.; Hall's Int. Law, (3rd ed.), 199-200; § 58.

[4] Wheaton's Int. Law (Boyd's 2nd ed), 132—133, § 101; 1 Twiss' Law of Nations (2nd ed.), 272; § 165; Kent's Int. Law (Abdy's 2nd ed.), 370; Hall's Int. Law (3rd ed.), 191—195; § 55; Maine's Lect. on Int. Law, 91.

The Charkieh, L. R. 4 Adm. & Eccl. 59.

The Constitution, 4 P. D., 39.

The Parlement Belge, 4 P. D., 129; 5 P D., 197.

With regard to acts committed on board a public vessel, a distinction is drawn between those that begin and end on board the vessel, the consequences thereof taking no effect externally to her, and those that being done on board the vessel result in consequences external to her. In the one case, the jurisdiction of the state to which the vessel belongs, is exclusive. In the other, the state whose territorial laws are infringed must as a rule apply for redress to the government of the country to which the vessel belongs, the latter being alone competent to punish the offender, except in very extreme cases.

length of time by any one state to give it a prescriptive right to that portion by the acquiescence of other states.[1]

I. **Extent of territorial water**:—Let us next consider the extent of the territorial water of a state and the nature of the sovereignty and dominion which that state is entitled to exercise over it.

First, then, as to the *extent* of this territorial water. The chief reasons which have influenced the publicists from the earliest times in denying to any state exclusive dominion and sovereignty over the main ocean, cease to be applicable when we come to consider the nature of those parts of it which adjoin the coasts of any maritime state. In the vicinity of the coasts of some maritime states are to be found coral, amber, pearl, sea-weed, shell-fish, &c. in the open sea. However bounteous the gifts of nature might be, these sea-products would soon be exhausted, if all the nations of the earth were permitted to appropriate them indiscriminately,[2] while it would be neither unjust nor unprofitable to allow the exclusive appropriation of such products by those states on whose borders they are found.[3] Indeed to allow other nations to participate in them would result in manifest injustice. Besides, every state in the interests of its own safety and self-preservation, is entitled to guard its maritime frontier as against other nations, like any other frontier on land. "It is of considerable importance" says Vattel, "to the safety and welfare of the state that a general liberty be not allowed to all comers to approach so near their possessions, especially with ships of war, as to hinder the approach of trading nations, and molest their navigation."[4] However impracticable it may be for a state to preserve continuous physical possession over its adjoining water, it is doubtless always possible to assert such a domination over them as effectually to exclude every other nation from their use. It is this physical capacity of exclusion which jurists and publicists have almost invariably regarded as the essential constituent of possession.[5] Hence it follows that, every maritime state is

[1] Wheaton's Int Law (Boyd's 2nd ed.), 220; § 164; *The Twee Gebroeders*, 3 C. Rob. 339; 1 Twiss' Law of Nations (2nd ed.), 295; § 182.

[2] Vattel's Law of Nations, Bk. i. c. 23. § 287.

[3] Puffendorf, de Iur. Nat. et Gent., lib. iv. c. 5. § 9.

[4] Bk. i. c. 23. § 288.

[5] Savigny on Possession, Bk. ii. § 16; Holland's Jurisprudence (4th ed.), 160; 1 Twiss' Law of Nations (2nd ed.), 234—235.

Existimem itaque, eo usque possessionem maris proximi videri porrigendam, quousque

entitled to exercise sovereignty and dominion over a portion of the high seas, within a certain distance from its coasts so far as its safety renders it necessary, and its power is able to assert itself. But as that distance cannot, with convenience to other states, be a variable distance, depending on the presence or absence of an armed fleet, it was necessary that some fixed and determinate limit should be agreed to by the common assent of all states. Bynkershoek in his famous essay, De Dominio Maris, was the first to suggest that the portion of the open sea over which a state could command obedience to its sovereignty by the fire of its cannon from its coast should be considered as a part of its territory: "Quousque è terra imperari potest,—Quousque tormenta exploduntur,—Terræ dominium finitur, ubi finitur armorum vis,[1]"—is his language. Succeeding publicists have one and all accepted this suggestion, and fixed the distance at a marine league from the shore at low tide. It may now be taken as fairly established by the consensus of civilized nations that each maritime state is entitled to the extension of its frontier over the sea which washes its shores to the distance of a league or three sea miles from low-water mark. The great improvements recently effected in the range of artillery, may, perhaps, render it desirable, consistently with the requirements of the principle upon which a state appropriates this marine belt, that its measure of distance should be increased, but this can only be done by the general consent of nations or by specific treaty with particular states.[2] It should be borne in mind, that the

continenti potest haberi subditum; eo quippe modo, quamvis non perpetuo navigetur, recte tamen defenditur et servatur possessio iure quaesita: neque enim ambigendum est *eum possidere continuo, qui ita rem tenet, ut alius eo invito tenere non possit.* Bynkershoek, Dissertatio de Dominio Maris, c. 2.

1 Dissertatio de Dominio Maris c. 2.

The writers who preceded Bynkershoek, entertained vague and widely divergent views as to the distance to which the dominion might be extended. "Albericus Gentilis extended it to one hundred miles; Baldus and Bodinus to sixty; Loccenius (de Iure Maritimo c. iv. § 6) puts it at two days' sail; another writer (Rayneval) makes it extend as far as could be seen from the shore. Valin in his commentary on the French Ordonnances of 1681, (ch. v.), would have it reach as far as the bottom could be found with the lead-line." *Reg.* v. *Keyn*, 2 Ex. D. (63), 176, *per* Cockburn, C. J. See also Wheaton's Int. Law (Lawrence's 2nd ed.), 320; § 6 (note 103).

2 1 Phillimore's Int. Law (3rd ed.), 276; § 198. The Crown of England, under a treaty with the Emperor of China has jurisdiction over British subjects "being within the dominions of the Emperor of China, or being within any ship or vessel at a distance of not more than one hundred miles from the coast of China." 1 Phillimore's Int. Law (3rd ed.), 283; § 199.

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three-mile zone around the coasts of a maritime state is termed its 'territorial water,' in a metaphorical sense only, because a certain portion of the high seas can be properly described as territorial, only on the assumption that the sovereignty and dominion of the adjoining state over it is absolute and exclusive, which, however, in the case of the territorial water they are not. To obviate any chance of confusion that may possibly arise from the use of this expression, Sir Travers Twiss prefers to designate this portion of the high seas adjacent to a state as its 'jurisdictional waters.'

II. Sovereignty and dominion over territorial water.—The next and most important branch of our enquiry is, what is the precise nature of the sovereignty and dominion which a state is entitled to exercise over its territorial water? There has been some difference of opinion amongst internationalists upon this matter, but they are clearly agreed so far that, this sovereignty and dominion of the state are not so absolute and paramount over its territorial water as they are over its territory by land and its ports. "This right of dominion or property," says Sir Travers Twiss, "gives to a nation a right to exclude all other nations from the enjoyment of the territory of which it has taken possession, and its right of empire (sovereignty) warrants a nation to enforce its own sanctions against all who would intrude upon its territory."[1] Every state, therefore, in the exercise of its right of dominion, has an absolute right to refuse a passage to foreigners over its territory by land, whether in time of peace or war. But with regard to the passage of foreign ships over its territorial water, internationalists are agreed that a state possesses no such right of interdiction, if such passage be with an innocent or harmless intent or purpose.[2]

Mr. Manning, in his Law of Nations, thus limits the purposes as to which this right of sovereignty and dominion may be exercised :—"For some limited purposes" says he "a special right of jurisdiction, and even (for a few definite purposes) of dominion, is conceded to a state in respect of the part of the ocean immediately adjoining its own coast line. The purposes for which this jurisdiction and dominion have been recognized are— (1) the regulation of fisheries; (2) the prevention of frauds on custom laws; (3) the exaction of harbour and lighthouse dues; and (4) the protection of the territory from violation in time of war between

[1] 1 Twiss' Law of Nations (2nd ed.), 231; § 143.

[2] Hall's Int. Law (3rd ed.), 201-203; § 59; 1 Twiss's Law of Nations (2nd ed.), 302; § 186 *Reg.* v. *Keyn*, 2 Ex. D. (63), 82.

other parties. The distance from the coast line to which this qualified privilege extends has been variously measured,—the most prevalent distances being that of a cannon-shot or of a marine league from the shore."[1] This may be accepted as a fair summary of the purposes for which a state, according to modern international law, may exercise sovereignty and dominion over its territorial water.

But, according to the ancient municipal law of England, the Crown is said to have possessed absolute sovereignty and dominion over the British Seas as against foreign nations, including the right to prohibit foreign vessels from passing over them; and in the controversy regarding the freedom of the seas in the seventeenth century, the English writers and lawyers under the lead of Selden[2] strenuously maintained the right of the Crown of England to these waters, insisting that the title to the sea and to the fundus maris, or bed of the sea—tam aquae quam soli—was in the King. Lord Hale says, "The King of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the King hath that propriety in the sea."[3] "The narrow sea, adjoining to the coast of England, is part of the waste and demesnes and dominions of the King of England, whether it lie within the body of any county or not."[4] Coke, Bacon, Blackstone and Callis have at different periods re-asserted the same doctrine,[5] and so have the more modern writers.[6] But, in *Reg.* v. *Keyn* the Judges unanimously declared that, such a doctrine had long since been abandoned, though, no doubt, some of them held that it applied to the three-mile zone.

(a.) **Sovereignty over territorial water.**—The right of sovereignty involves the right of civil and criminal legislation, and if a state had as complete dominion and sovereignty over its littoral sea, as it possesses over its land territory, it would follow that the laws of a state, whether civil or criminal ought, proprio vigore, to apply to its subjects as well as to foreigners within its littoral sea, and no special legislation

[1] Manning's Law of Nations (Amos' ed.), 119.

[2] 1 Bacon's Abr. 640; Co. Litt. 107; Hale, de Iure Maris, cc. 4, 6.

[3] Hale, de Iure Maris, c. 6; Hargrave's Law Tracts, 31.

[4] Hale, de Iure Maris, c. 4; Hargrave's Law Tracts, 10.

[5] Co. Litt. 107, 260*b*; Bacon's Abr. tit. Court of Admiralty; 1 Black. Comm, 110; Callis on Sewers, 39-41.

[6] Schultes' Aquatic Rights, 1-5; Chitty on Prerogative, 143, 173, 206; Woolrych on Waters (2nd ed.), 41; Hall on the Seashore (2nd ed.), 2, 3; Morris' Foreshore, 663.

ought to be necessary. But with regard to foreigners in foreign ships navigating this part of the sea, various treaties have been entered into between England and some of the foreign states, and various statutes have been passed by Parliament, for the maintenance of neutral rights and obligations,[1] the prevention of breaches of the revenue[2] and fishery laws, and for relief in certain cases of collision. The treaties and legislation for the first two purposes have been altogether irrespective of the three-mile distance, being founded on a recognized principle of international law, namely, that a state has a right to take all necessary measures for the protection of its territory and its subjects, and the prevention of any infraction of its revenue laws. In the *Twee Gebroeders*[3] Lord Stowell distinctly affirmed the principle that, within a limit of three miles from the coast of a state, all direct hostile operations are by the law of nations forbidden to be exercised. In *Church* v. *Hubbard*,[4] decided in the United States in America, Marshall, C. J., fully explained the principles upon which the right of a state to legislate within this limit for the protection of its revenue is founded. The English legislature has asserted a certain jurisdiction over foreign ships by the 527th section of the Merchant Shipping Act, 17 and 18 Vict. c. 104, which provides that "whenever any injury has in any part of the world been caused to any property belonging to Her Majesty, or to any of Her Majesty's subjects, by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom, or within three miles of the coast, if it be shown that such injury was probably caused by misconduct, or want of skill of the master or mariners, it may be detained until satisfaction be made for the injury, or security be given to abide the event of any action or suit." The Privy Council in *Rolet* v. *The Queen*,[5] on appeal from a

[1] Cf. The Foreign Enlistment Act (33 & 34 Vict. c. 90), which imposes penalties for various acts done in violation of neutral obligations. It applies to all the dominions of Her Majesty, 'including the adjacent territorial waters.' This statute therefore applies to India and the Colonies.

[2] Cf. 39 and 40 Vict. c. 36, An Act for the consolidation of Acts relating to Customs. S. 179 of this Act embodying the provisions of s. 212 of the previous Act, 16 & 17 Vict. c. 137, enacts that if a foreign vessel is found within three miles of the coast, conveying spirits, tea or tobacco, otherwise than in vessels or packages of certain specified dimensions, the articles in question as well as the vessel itself shall be liable to forfeiture.

[3] 3. C. Rob. 162.

[4] 2 Cranch, (U. S.), 234, cited in *Reg.* v. *Keyn*, 2 Ex. D. 63.

[5] L. R 1 P. C. 198.

sentence of the Vice-Admiralty Court of Sierra Leone, which had condemned goods and boats seized for breach of the customs ordinances of the Colony, held, that although the Colonial legislature had power to make laws for the protection of its revenue, within a distance of three miles from the shore, yet it being proved in the case that the vessel from which the goods had been unshipped was not within three miles from the shore at the time of the unloading, it was not liable to the harbour dues payable under the customs ordinances. *The Leda*,[1] a salvage case, and *General Iron Screw Colliery Co.* v. *Schurmanns*,[2] a collision case, arose with regard to the construction of certain sections of the Merchant Shipping Act. In the former Dr. Lushington held that s. 330 of the Statute 17 & 18 Vict. c. 104, which is limited in terms to 'the United Kingdom,' included the three miles of open sea round England. In giving judgment, he says:—"Then arises another question—what are the limits of the United Kingdom, according to the intention and true construction of the statute? Now, the only answer I can conceive to that question is, the land of the United Kingdom and three miles from the shore." It might be said that this case had no reference to foreign ships at all; but this objection does not apply to the other case because the circumstances of that one went a good deal further. There the collision had occurred within three miles of the English coast, and the damage was done by a British to a foreign vessel. The owners of the British vessel filed a bill in Chancery to declare a limitation of her liability according to the provisions of s. 504 of the Merchant Shipping Act, 17 & 18 Vict. c. 104. It was admitted that unless there was reciprocity, that is to say, unless the statute might in the like case, have been relied on by the foreign ship, it could not be relied on against her. The question therefore argued was, whether the statute applied to the locality of the collision, and therefore would have applied to the foreign ship. Upon this, Wood, V. C., (afterwards Lord Hatherley), in delivering judgment, said:—"With respect to foreign ships, I shall adhère to the opinion which I expressed in *Cope* v. *Doherty*,[3] that a foreign ship meeting a British ship on the open ocean cannot properly be abridged of her rights by an Act of the British legislature. Then comes the question how far our legislature could properly affect the rights of foreign ships, within the limits of three miles from the coast of this country. There can be no possible doubt that the water below low-water mark is part of the high sea. But it is equally beyond

[1] Swa. Adm. 10. [2] 1 J. & H. 180. [3] 4 K. & J. 367; 2 D. & J. 614.

question that for certain purposes every country, may, by the common law of nations, legitimately exercise jurisdiction over that portion of the high seas which lies within the distance of three miles from its shore. Whether this limit was determined with reference to the supposed range of cannon, on the principle that the jurisdiction is measured by the power of enforcing it, is not material, for it is clear, at any rate, that it extends to the distance of three miles; and many instances may be given of the exercise of such jurisdiction by various nations. This being so, one would certainly expect that that recognized limit would be the extent of the jurisdiction over foreign ships which the Merchant Shipping Act would purport to exercise. In dealing with so large a subject, the natural desire of the legislature would be to exert all the jurisdiction which it could assert with a due regard to the rights of other nations." Further on, he observes:—" Authorities have been cited to the effect that every nation has the right to use the high seas, even within the distance of three miles from the shore of another country; and it was contended that it was not legitimate to interfere with foreigners so using this portion of the common highway, except for the bonâ fide purposes of defence, protection of the revenue, and the like. It is not questioned that there is a right of interference for defence and revenue purposes; and it is difficult to understand why a country having this kind of territorial jurisdiction over a certain portion of the high road of nations, should not exercise the right of settling the rules of the road in the interests of commerce. An exercise of jurisdiction for such a purpose would be, at least, as beneficial as for purposes of defence and revenue."

It follows from the doctrine of exterritoriality of ships, to which I have already adverted, that the criminal law of England applies to British subjects as well as to foreigners[1] on board British ships on the high seas, and that it does not apply to foreigners in foreign ships on the high seas. But the question, whether it applies to foreigners in foreign ships within the territorial water of England, seems never to have arisen before the case of *Reg.* v. *Keyn*,[2] decided in 1876. Before I come to that case I shall call your attention to the course of decisions in this country prior to that date. The qualified power of legislation which the Indian legislature possesses by delegation from the British Parlia-

[1] *Reg.* v. *Sattler*, Dears & B. Cr. C. 526; *Reg.* v. *Anderson*, L. R. 1 Cr. C. 161; *Reg.* v. *Lesley*, Bell, Cr. C. 220, 234.

[2] 2 Ex. D. 63.

ment in consequence of its peculiar position as a dependency of England has served to raise before the Courts in this country some important questions with reference to the territorial water of India, for instance, (1) as to the power of the Indian legislature to make laws affecting British subjects, native or European, navigating such waters in British ships, and (2) as to the extent of the operation of the Indian Penal Code within such limits. The cases, in which these questions have been raised, contain a judicial discussion of some of the points, upon which the solution of the question I have just proposed to consider ultimately depends.

In *Reg.* v. *Irvine*,[1] a certain offence was committed by a European British subject within three miles of the coast of India, and the question arose whether the accused was to be charged according to English law or under the Indian Penal Code. Mr. Justice Holloway suggested that the locality was within the territories of British India, as defined in ss. 1 and 2 of the Indian Penal Code, and that the offence ought to be charged under that Code.

In *Reg.* v. *Elmstone, Whitwell, et al.*[2] one of the prisoners, named Marks, a European British subject, and a seaman on board a British ship, the 'Aurora,' was charged with maliciously destroying the ship by fire on the high seas, at a distance of more than three miles from the shore of British India, and within the Admiralty jurisdiction of the High Court of Bombay. The trial, of course, took place according to the High Court's Criminal Procedure Amendment Act, XIII of 1865, which was the lex fori at the time, but the question arose whether the nature and extent of the punishment to be awarded to the prisoner was to be regulated by the English law, or by the Indian Penal Code. This involved the consideration of several important points, namely:—(*a*) Whether the Governor-General of India in Council had the power to legislate over European British subjects on the high seas beyond three miles from the coast of India, either in British or in foreign vessels, or over foreigners in such parts of the high seas in British vessels? (*b*) Whether there had been in fact such legislation? (*c*) Whether the Governor-General of India in Council had the power to legislate over British subjects within the territorial water of India, or over foreigners

[1] 1 Madras Sessions, 1867, cited in Mayne's Penal Code in the commentary on s. 4.

[2] 7 Bomb. H. C. (Cr. C.) 89. Cf. *Reg.* v. *Thompson*, 1 B. L. R. (O. Cr. J.) 1, (as to the law under which the sentence is to be inflicted under similar circumstances); *The Queen* v. *Mount*, L. R. 6 P. C. 283.

within that limit, and (*d*) Whether the operation of the Indian Penal Code extended over such territorial water? With regard to (*a*), Sir Michael Westropp held that the statute 32 & 33 Vict. c. 98, as well as the statute 28 & 29 Vict. c. 17, left it an open question. With regard to (*b*), he held that Act XXXI of 1838 having been repealed by the Indian Penal Code (Act XLV of 1860) and Act II of 1869, it was unnecessary to determine it, as it depended on the construction of the repealed Act. As to (*c*), he held that having regard to the established rule of international law, and the case of *Rolet* v. *The Queen*,[1] the Indian legislature probably did possess the power of legislating with regard to the high seas within a distance of three miles from the shores of British India. And lastly, as to (*d*), which was the most important of all the points involved in the case, as it is the one with which we are now more directly concerned, the Chief Justice was of opinion that, the words "the whole of the territories which are or may become vested in Her Majesty by the statute 21 & 22 Vict. c. 106",—(by which statute all the territories in the possession or under the government of the East India Company were transferred to the Crown and over which the Indian Penal Code was to have operation), included the maritime territory of British India, or its territorial water. In the result he held that, the offence in question having been committed beyond this maritime territory of British India, the substantive law under which the sentence was to be passed was the English law and not the Indian Penal Code. It might be said that the decision of the Court upon the last point was a mere obiter dictum, because no one ever suggested that the criminal law of a country could have so wide an operation as to extend to persons on the high seas at a distance, as in this case, of more than fifty miles from its shores, yet it shows at any rate that the Chief Justice of Bombay, before whom *Reg.* v. *Irvine*[2] does not appear to have been cited, was disposed to lay down the same doctrine which Mr. Justice Holloway had previously expressed in that case.

This last point, however, arose directly, in the case of *Reg.* v. *Kastya Rama et al.*[3] where the prisoners, native Indian subjects, were charged with having committed certain offences on the high seas, but within three miles from the coast of British India. The case was tried

[1] L. R. 1 P. C. 198.

[2] 1 Madras Sessions, 1867, cited in Mayne's Penal Code in the commentary on s. 4.

[3] 8 Bomb. H. C. (Cr. C. 63). Cf. *Bapu Daldi* v. *The Queen*, I. L. R. 5 Mad. 23.

originally by the Magistrate of the Thana District. The statute 23 & 24 Vict. c. 88, coupled with the statute 12 & 13 Vict. c. 96 had conferred jurisdiction on the Mofussil Courts over persons brought before them charged with offences committed in places where the Admiral had jurisdiction; so that the question of jurisdiction was scarcely mooted in argument. But one of the principal questions discussed was under what law, the English or the Indian, the sentence was to be passed. Kemball & West, JJ., before whom the case had been brought under their revisional jurisdiction, approved of the decision of Holloway, J., in *Reg.* v. *Irvine*,[1] and distinctly declared that the territorial jurisdiction of British India extended into the sea as far as one marine league from its coast, that the Indian Penal Code was applicable to offences committed within this limit, and that therefore the prisoners were rightly punished under the Indian Penal Code. Mr. Justice West, in the course of his judgment, says:—"Writers on international law have recognized the principle that so far as its own subjects are concerned, every state may properly define the limits of its own territories beyond the line of coast. The necessities of orderly government on which this principle rests are as great and obvious in a dependency as in the ruling country. A limit of three miles from shore has thus come to be recognized as undoubtedly within the general powers of legislation conceded to Colonial governments (*Rolet* v. *The Queen*, L. R., 1 P. C. 198); on the same ground of public convenience and necessity it might not unreasonably be argued that these powers extend, except where otherwise expressly restricted, to the making of laws for sea-going vessels engaged in fishing or on voyages from one port in India to another, and the persons on board such vessels."

It is necessary to consider in this connection the effect of the statute 37 & 38 Vict. c. 27, cited as The Courts (Colonial) Jurisdiction Act, 1874, upon the foregoing decisions. It is an Act passed for the purpose of regulating the sentences imposed by Colonial Courts where jurisdiction to try offences is conferred by Imperial Acts. Section 3, among other things, enacts that, when by virtue of any Act of Parliament, a person is tried in a Court of any Colony for any crime or offence committed upon the high seas out of the territorial limits of such Colony, such person shall, upon conviction, be liable to such punishment as might have been inflicted

[1] 1 Madras Sessions, 1867, cited in Mayne's Penal Code in the commentary on s. 4.

upon him, if the crime or offence had been committed within the limits of such Colony. The term 'Colony' in the above section includes British India by virtue of sec. 2 of the Act. It is therefore evident that this statute certainly abrogates the law laid down in *Reg.* v. *Thompson*,[1] *Reg.* v. *Elmstone, Whitwell, et al.*[2] and *The Queen* v. *Mount*,[3] (the last being a decision of the Privy Council), because it is only under Acts of Parliament and not under Acts of the local legislatures that the Indian and the Colonial Courts are empowered to try offences committed on the high seas. But the statute leaves untouched *Reg.* v. *Irvine*,[4] and *Reg.* v. *Kastya Rama et al.*[5] if the high seas within the distance of a marine league from the shores of British India be considered to be within its territorial limits, (as to which, however, the statute is silent), because in that case the local Courts derive their jurisdiction from the Acts of the local legislatures.

You will have observed that in none of the above cases were the Courts called upon to consider, the question whether they had jurisdiction to try and punish foreigners on board foreign ships for offences committed by them within the limits of the territorial waters. That question arose for the first time in England in *Reg.* v. *Keyn*, more popularly called the 'Franconia' case, which, for the profundity of learning, research and legal reasoning displayed in the judgments of some of the most eminent judges who took part on that occasion, will endure as a conspicuous landmark in the legal literature of England. The 'Franconia' a German ship, commanded by Keyn, a German subject, was on her voyage from Hamburg to the West Indies. When within two and a half miles from the beach at Dover and less than two miles from the head of the Admiralty pier, she, through the negligence, as the jury found, of Keyn, ran into the British ship 'Strathclyde,' sank her and caused the death of one of her passengers. The accused Keyn was tried at the Central Criminal Court and convicted of manslaughter under the English law. The learned judge at the trial, Pollock, B., reserved the question of jurisdiction for the opinion of the Court for Crown Cases Reserved. The case was twice argued; the second time before fourteen judges, and the conviction was quashed by a majority of seven to six, one judge Archibald, J., having died before the judgment was given, but whose opinion was known to have been the same as that of the majority. The

[1] 1 B. L. R., (O. Cr. J.,) 1. [2] 7 Bomb., H. C., (Cr. C.), 89. [3] L. R., 6 P. C. 283.
[4] 1 Madras Sessions, 1867, cited in Mayne's Penal Code in the commentary on s. 4.
[5] 8 Bomb., H. C., (Cr. C.), 63.

minority of the Court, Lord Coleridge, C. J., Brett and Amphlett, JJ. A., Grove, Denman and Lindley, JJ., held that by the law of nations, the open sea within three miles of the coast of England is a part of the territory of England as much and as completely as, if it were land, it would be part of its territory, subject, however, to the right of free navigation on the part of other nations, if such navigation be with an innocent or harmless purpose; that this right of navigation is merely a liberty or easement which all the world enjoys in common, and does not by any means derogate from the sovereign authority of the state over all its territory; that consequently every provision of English law, Common or statute law, applies to the whole of this territory; that the Central Criminal Court, which succeeded to the criminal jurisdiction of the Admiral over the seas without the body of a county, had jurisdiction to try the case. Lord Coleridge, C. J., and Denman, J., relied on the further ground that the offence was in contemplation of law wholly committed on board a British ship and therefore within the territorial jurisdiction of England. The majority of the Court, Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush and Field, JJ., Sir R. Phillimore and Pollock, B., held that the Central Criminal Court had no jurisdiction, and quashed the conviction. The elaborate judgment of Lord Cockburn, C. J., in which the majority of the Court substantially agreed, proceeded upon the ground that the sovereignty of a state over the seas adjoining its shores exists only for certain definite purposes, for which such sovereignty has been conceded to it by other nations, *i. e.*, the protection of its coasts from the effects of hostilities between other nations when they are at war, the protection of its revenue and of its fisheries, and the preservation of order by its police; that granting that, usage and the common assent of nations have appropriated the sea within three miles of the shore to the adjacent state, to deal with it as such state might think fit and expedient for its own interests, yet such concurrent assent of nations cannot of itself, without express and specific legislation by Parliament, convert that, which before was in the eye of the law high sea, into British territory so as to render the whole of the Common law, and the statutes which have no special reference to such waters, proprio vigore, applicable to it, or invest the municipal Courts with a jurisdiction over foreigners on board foreign ships, a jurisdiction which they did not possess before. Lord Chief Baron Kelly and Sir Robert Phillimore, seemed rather to throw a doubt as to the competency

of Parliament consistently with a due regard to the rights of other nations and the principles of international law, to make the English criminal law applicable within the limits of the territorial water.[1]

In consequence of the decision in this case, which, it may be observed in passing, cannot be considered as altogether satisfactory, the British Parliament shortly after, in the session of 1878, passed a statute, 41 & 42 Vict. c. 73, called the Territorial Waters Jurisdiction Act,[2] which, by virtue of the interpretation clause contained in sec. 6, expressly extends to India and the Colonies. The preamble recites that "the rightful jurisdiction of Her Majesty, her heirs and successors extends, and has always extended over the open seas adjacent to the coasts of the United Kingdom, and of all other parts of Her Majesty's dominions to to such a distance as is necessary for the defence and security of such dominions."

The statute, therefore, is not merely enactive but also declaratory of the existing jurisdiction over the territorial waters. The Act, among other things, provides that, "An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly;" and it then declares that "The territorial waters of Her Majesty's dominions, in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by the Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

A doubt seems to have been entertained by some of the Judges who were in the minority in the case of *Reg.* v. *Keyn*, whether when an

[1] Sir Henry Maine and Mr. Hall have criticized the opinion of the majority, as being based rather on grounds of municipal than of international law. Maine's Lect. on Int. Law, 38—44; Hall's Int. Law (3rd ed.), 202; § 59 (note).

[2] See Lord Chancellor's (Lord Cairn's) speech introducing the Bill in Parliament. Reprinted in Hallock's Int. Law (Baker's ed.), 559

offence is committed on board a foreign ship traversing the territorial water of a state, and no one, save its passengers or crew, is concerned in, or suffers from, what is done on board, such state can assume jurisdiction over the offence and punish it. But if a foreign ship lying in, or entering, the port of a state be, as doubtless it is, according to the rules of international law, subject to the jurisdiction of that state, so fully and completely that every offence committed by one foreigner upon another on board that ship becomes cognizable by the criminal Courts of that state concurrently with the Court of the state on which it depends, it seems somewhat difficult to conceive why a different rule should be applied to that ship when she is passing through its territorial water. The difficulty of drawing the line between a vessel which, from stress of weather, casts anchor for a few hours in a bay within the legal limits of a port, though perhaps twenty miles from the actual harbour, and a vessel entering a port, would seem to indicate that the same rule ought to be equally applicable in both the cases. It may also be remarked that the terms of section 2 of the statute 41 & 42 Vict. c. 73, to which I have already referred, are apparently comprehensive enough to include the case in question. The Criminal Courts in France, however,[1] refuse to exercise jurisdiction over offences committed by one foreigner upon another on board a foreign ship, or over acts concerning the interior discipline of that ship, either when it is passing through her territorial water or lying in any of her ports, provided the peace of that port is not affected. The reasonableness and expediency of this practice have been so amply demonstrated by Mr. Hall, that it seems somewhat strange that it should not have yet been adopted by every other state as an international rule.[2]

(b) Dominion over territorial water.—We have hitherto confined our attention to the nature of the sovereignty or jurisdiction which a maritime state, and particularly England, is entitled to exercise over its territorial sea. We shall now examine the nature of the dominion or right of property which it may exercise over it. Primâ facie, sovereignty and dominion are correlative and co-extensive. When a nation takes possession, for instance, of a vacant tract of land, it acquires, under ordinary circumstances, the dominion or fullest right of property concurrently with the right of sovereignty. But this general rule is liable to modification according to the nature and circumstances of the place of which a nation takes possession. The case of the territorial

[1] Hall's Int. Law, (3rd ed.) 198-199; § 58.

[2] Ibid., 201-202; § 59.

waters is one where some modification of the rule is necessary. The nature of both sovereignty and dominion over these waters is somewhat peculiar.

Testing the nature of dominion over these waters by the possible physical uses of which they alone seem to be capable, namely, navigation and fishery, it is undoubted that, unlike the waters encompassed by the territorial limits of a state, these waters are open to the peaceful navigation of the whole world, while at the same time international law has uniformly conceded to every independent littoral state the exclusive right of fishery over its territorial water, to be exercised subject, though it might be, to the overriding and paramount exigencies of navigation.[1] By treaties with France and the United States as well as by the implied assent of nations, the right of fishing within three miles of the coast of the United Kingdom is vested exclusively in the subjects of Her Majesty.[2]

If a state had as complete dominion over this belt of sea, as it possesses over its territory on land, it would follow that its ownership of the subjacent soil would be equally absolute. The fact of encroachments on the sea, by the construction of harbours, piers, forts, breakwaters and the like, generally made by states, is sometimes adduced as evidencing their right of property in the soil of their adjacent waters; but such evidence must, indeed, be regarded as very feeble proof of such proprietary right, as the acquiescence of other states in such encroachments is capable of being explained on the ground that, being made for the benefit of navigation, as they generally are done, they are made for the common benefit of all states, or that, being constructed for the purposes of defence, they are made within the strict limits of the right of self-preservation inherent in all states. Lord Hale, who, as I have already observed, was an implicit adherent of the now exploded doctrine of the sovereignty and dominion of the King of England over the adjacent narrow seas, maintained that the King's right of property or ownership in the sea and the soil thereof was evidenced principally (1) by his right of fishing in the sea, and (2) by his right of property to the shore and the maritime increments.[3]

In England the question regarding the right of the Crown to the

[1] Puffendorf, de Iur. Nat. et Gent., lib. iv. c. 5. § 9; Vattel's Law of Nations, Bk. i. c. 23. § 287. "Who can doubt" says Vattel, "that the pearl fisheries of Bahrem and Ceylon may lawfully become property." 1 Twiss' Law of Nations, (3rd. ed.) 311—313; § 191; Wheaton's Int. Law (Boyd's 2nd ed.), 237; § 177.

[2] Wheaton's Int. Law (Boyd's 2nd ed.), 241.

[3] De Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 10-17.

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bottom of the sea has been incidentally raised in several cases. Passing over *Blundell* v. *Catterall*,[1] *King* v. *Lord Yarborough*[2] and *Benest* v. *Pipon*,[3] in which the proprietary right of the Crown to the land beneath the sea is asserted in general terms, founded, apparently, upon the old doctrine of the narrow seas, which still seemed to linger in the minds of the judges, we come to comparatively more recent decisions, influenced, no doubt by the modern international doctrine of the three-mile zone, in which the ownership of the Crown in the soil of this limited portion of the sea is expressly acknowledged. In *Gammell* v. *Commissioners of Woods and Forests*,[4] in the House of Lords, in which the exclusive right of the Crown to the salmon fishery on the coast of Scotland was in question, Lord Wensleydale in delivering his opinion, said:—"That it would be hardly possible to extend fishing seaward beyond the distance of three miles, which by the acknowledged law of nations belongs to the coast of the country—that which is under the dominion of the country by being within cannon range—and so capable of being kept in perpetual possession." And Lord Cranworth, too, apparently entertained the same opinion. In *Whitstable Free Fishers* v. *Gann*,[5] which involved the right to collect tolls for anchorage beyond low-water mark, Erle, C. J., laid down broadly that "the soil of the sea-shore, to the extent of three miles from the beach, is vested in the Crown." When this case came before the House of Lords on appeal,[6] Lord Wensleydale assented to that rule, but Lord Chelmsford adverting more directly to the above statement of Erle, C. J., observed:—"The three-mile limit depends upon a rule of international law, by which every independent state is considered to have territorial property and jurisdiction in the seas which wash their coasts within the assumed distance of a cannon-shot from the shore. Whatever power this may impart with respect to foreigners, it may well be questioned whether the Crown's ownership in the soil of the sea to this large extent, is of such a character as of itself to be the foundation of a right to compel the subjects of this country to pay a toll for the use of it in the ordinary course of navigation."

The observations in the above cases are no doubt open to the remark that they are mere obiter dicta, and not judicial decisions on the point we are now discussing, but still as expressing the deliberate opinions of

1 5 B. & Ald., 268. 2 3 B. & C. 9; 1 Dow's App. Ca. (N. S.) 178.
3 1 Knapp, 60. 4 3 Macq. 465. 5 11 C. B. (N. S.) 387, 413.
6 11 H. L. C., 192; see the same case before Exchequer Chamber, 13 C. B., (N. S.) 853.

some of the most eminent judges in England, they are deserving of much considerable weight.

The decision of Sir John Patteson and the statute 21 & 22 Vict. c. 109, The Cornwall Submarine Mines Act of 1858, passed soon after by Parliament to give practical effect to that decision, is sometimes relied upon (and indeed was strongly relied upon by Lord Coleridge, C J., in *Reg.* v. *Keyn*,)[1] as showing conclusively the existence of the right of the Crown to the soil of the open sea below low-water mark. The Duchy of Cornwall, which is vested in His Royal Highness the Prince of Wales, by the Charter of 11 Edw. 3,[2] (having the force of an Act of Parliament), extends into the sea down to low-water mark. Mines in the Duchy existing under the bed of the sea within the low-water mark having been carried out beyond it, a question was raised on the part of the Crown as to (1) whether the minerals beyond the low-water mark, and not within the county of Cornwall, as also (2) those lying under the sea-shore between the high and low-water mark within the county of Cornwall, and under the estuaries and tidal rivers within the county belonged to the Crown or to the Duchy of Cornwall. The matter was referred to the arbitration of Sir John Patteson. The argument on the part of the Crown was that the bed of the sea below low-water mark, and therefore beyond the limits of the county of Cornwall, belonged in property to the Crown. The argument on behalf of the Duchy was two-fold: first, that all which adjoined and was connected with the county of Cornwall passed to the Dukes of Cornwall under the terms of the original grant to them, at the time of the creation of the Duchy; and therefore, that even if the bed of the sea elsewhere belonged to the Crown, it had passed from the Crown to the Dukes in the seas adjacent to Cornwall; secondly, that the bed of the sea did not belong to the Crown, and that the Prince was entitled, as first occupant, to the mines thereunder. As to the property in the mines and minerals lying under the seashore between high and low-water mark within the county of Cornwall, and under the estuaries and tidal rivers within the county, Sir John Patteson's decision was that, they were vested in His Royal Highness as part of the soil and territorial possessions of the Duchy of Cornwall. But on the first point, namely, as

[1] 2 Ex. D., 63.

[2] The charter is set out at length in the *Prince's case* (8 Co. Rep. 1) in which it was decided that this charter had all the effects of an Act of Parliament.

to the property in the mines and minerals lying beyond low-water mark, and not within the county of Cornwall, he expressed himself thus:—"I am of opinion and so decide, that the right to the minerals below low-water mark remains and is vested in the Crown, although those minerals may be won by workings commenced above low-water mark and extended below it." The statute 21 & 22 Vict. c. 109, which gave effect to this decision, went a little beyond the precise terms of this award, and declared and enacted that such mines and minerals were as between Her Majesty the Queen, in right of her Crown, and His Royal Highness the Prince of Wales, in right of his Duchy of Cornwall, "vested in Her Majesty the Queen in right of her Crown *as part of the soil and territorial possessions of the Crown.*"[1]

In India, the Bombay High Court, relying upon the English authorities above adverted to and a few more, have similarly held in two cases, (though the point did not directly arise in them) that the Government is the owner of the soil of the sea within a distance of three miles around the coasts of British India. In *Reg.* v. *Kastya Rama et al*,[2] where one of the points raised, namely, whether the removal of a number of fishing-stakes lawfully fixed in the sea within three miles from the shore by persons other than those who had planted them, constituted an offence under the Penal Code, depended upon a determination of the further question whether the bed of this portion of the sea as well as the fishery therein was or was not a part of the prerogative right of the Crown, West, J., in the course of his judgment, after citing the usual authorities,[3] observed, "These authorities support both the ownership by the Crown of the soil under the sea, and the proposition that the subjects of the Crown 'have also by common right a liberty of fishing in the sea, and in its creeks or arms as a public common of piscary,' 'yet in some cases the King may enjoy a property exclusive of their common of piscary. He also may grant it to a subject; and consequently a subject may be entitled to it by prescription.'[4] The sovereign's rights are as great under the Hindu and Mahomedan systems as under the

[1] See the judgment of Lord Coleridge, C. J., in *Reg.* v. *Keyn*, 2 Ex. D. (63) 155-158, and the criticism upon this arbitration by Cockburn, C. J., in the same case. 2 Ex. D. 199-202.

[2] 8 Bomb. H. C. (Cr. C.) 63.

[3] *Blundell* v. *Catterall*, 5 B. & Ald. 268; *Benest* v. *Pipon*, 1 Knapp, 60; *Malcolmson* v. *O'Dea*, 10 H. L. C. 593; *Sir H. Constable's case*, 5 Rep. 1056, and Butler's note to Co. Litt. §. 440.

[4] Hale, de Iure Maris, p. 1, c. 4; Hargrave's Law Tracts, 11.

English; but without a minute examination of these, it is sufficient to say that by the acquisition of India as a dependency, the Crown of Great Britain necessarily became empowered to exercise its prerogatives and enjoy its jura regalia in this country and on its coasts, subject always to the legislative control of Parliament."

The position thus laid down by Mr. Justice West was adopted by Sir Michael Westropp in *Baban Mayacha* v. *Nagu Shravucha and others*,[1] and supported in an elaborate, exhaustive and extremely learned judgment by independent reasoning and original research; though, no doubt, the actual circumstances of the case before his Lordship were not such as to necessitate an expression of judicial opinion. It was a civil action for damages and for an injunction to restrain an alleged illegal disturbance of the plaintiff's right to fish and use fishing stakes and nets fixed in the sea below low-water mark and within three miles from the coast. It having been conceded that, in the absence of any appropriation by the Crown of the soil of the territorial water of British India or of the right of fishing therein to any particular individuals, such right was common to all the subjects of Her Majesty, and the Court being of opinion that an interference with the reasonable exercise of that right was actionable, the question we are now considering, namely, as to the right of the Crown to the soil of the territorial water of British India, could not directly arise. The learned Chief Justice, however, fully reviewed almost all the authorities bearing upon the point, and said:—"Howsoever great or small may be the value of the analogy, it may perhaps be well to observe that as in Great Britain the sovereign, as Lord of the Waste, is said to be Lord also of the British territorial waters and the soil beneath them, so in India we find that, as a general rule, its waste lands are vested in the Ruling Power." And then again, after discussing the various authorities which tend to establish the proposition that, the ownership of the beds of tidal rivers in British India is generally vested in the Crown, he puts forth an additional argument thus:—"Assuming, as I think we may, that the proposition—that the beds of tidal rivers in British India are, like those of such rivers in Great Britain, primâ facie, to be regarded as vested in the Crown—is established, the transition thence to the proposition—that the subjacent soil of the British Indian seas, within the territorial limit of three geographical miles from low-water mark, is also vested in the Crown—is (if the like proposition as to

[1] I. L. R., 2 Bomb., 19.

the territorial waters of Great Britain be true) not difficult, for a navigable river, in such part of it as the tide flows and ebbs is an arm of the sea."

The statute 41 and 42 Vict. c. 73, which, as I have already observed, extends also to India, throws no light whatever upon this question. It does not at all declare the law as to the ownership of the bed of the sea below low-water mark. According to the decision of the majority in *Reg.* v. *Keyn*,[1] which is binding on all the Courts in England,[2] it seems now to be finally settled that, no statute having been passed by Parliament appropriating the bed of the territorial water round the British coasts, the Crown has not, except in the case of an uninterrupted occupation for a sufficient time to gain a title by prescription, any right to this bed as against other nations. Notwithstanding the dicta of the learned Judges in *Reg.* v. *Kastya Rama et al*[3] and *Baban Mayacha* v. *Naga Shravucha and others*[4] noticed above, the judgment of the Court of Common Pleas in *Blackpool Pier Co.* v. *Fylde Union*,[5] declaring the effect of *Reg.* v. *Keyn* upon the point under discussion, would seem to render a further consideration of it necessary in India.

According to international law, every maritime state, which takes upon itself the burden and charge of securing and assisting navigation, either by erecting or maintaining lighthouses, or by affixing sea-marks to give notice of rocks and shoals, is entitled to impose a reasonable toll on all who navigate through its territorial water. The right of passage over all portions of the open sea is one of the natural rights of nations, but "every vessel" says Travers Twiss, citing Azuni, "which casts anchor within the jurisdictional waters of a nation, becomes liable to the jurisdiction of that nation in regard to all reasonable dues levied for the maintenance of the general safety of navigation along its coasts. If a vessel merely passes along the coasts of a nation without casting anchor within the limits of a marine league, or without entering any port or harbour, it is not subject to the payment of any territorial dues."[6]

[1] 2 Ex. D., 63.

[2] *The Franconia*, 2 P. D. 163; *Harris* v. *Owners of Franconia*, 2 C. P. D. 173.

[3] 8 Bomb. H. C. (Cr. C.,) 63. [4] I. L. R. 2 Bomb. 19.

[5] 46 L. J. (N. S.) M. C. 189, where the Court of Common Pleas held that the part of a pier below low-water mark was out of the realm, and therefore not rateable to the poor under 31 & 32 Vict. c. 122, s. 27.

[6] 1 Twiss' Law of Nations (2nd Ed.), 305; § 187; Grotius, de Iur. Bell. et Pac., lib. ii. c. 3. § 4.

If then, the law of nations permits every maritime state under the above circumstances to levy such a toll from a foreigner, it is manifest that the municipal law of that state would a fortiori allow such toll to be taken from its own subjects. But the foundation of this right being, in the one case as in the other, the construction and maintenance of some works of public utility calculated to aid and promote the safety of navigation, which may be said to form as it were the quid pro quo for the imposition of such a toll, it is manifest that no state can, without rendering any such corresponding benefit or service, compel its subjects to pay a toll for the use of its territorial water in the ordinary course of navigation; nor can a private individual merely by reason of his ownership of a districtus maris or a portion of the bed of the sea, either under a charter or grant from the sovereign, or by prescription which presupposes such a grant, claim to levy such a toll from persons navigating such waters. "If," says Hale, C. J., "any man will prescribe for a toll upon the sea, he must allege good consideration; because by Magna Charta and other statutes, every man has a right to go and come upon the sea without impediment." And so it has been decided in England, in *Gann* v. *The Free Fishers of Whitstable*,[1] that, the Crown cannot compel its subjects to pay a toll for casting anchor in the ordinary course of navigation in the bed of the territorial water round the British coasts, because the right to cast anchor is merely an incident of the right of free navigation to which every subject is entitled. The Crown may, however, levy such toll, if authorized by an Act of Parliament to do so.

Bays, gulfs and estuaries.—Besides the territorial water, the maritime dominion of every state also extends, according to the law of nations, over arms of the sea, bays, gulfs and estuaries, which are enclosed by headlands belonging to one and the same state, and wherever the sea coast is indented by small bays and gulfs, the territorial water which is superadded to them stretches seaward from an imaginary line drawn from one headland to another.[2] But as there are bays and gulfs of such large dimensions that they could not possibly be said to form a part of the territorial rights of a state, a qualification has been engrafted by the law of nations to the effect that, they must be of such configuration

[1] 11 H. L. C. 193.

[2] 1 Twiss' Law of Nations (2nd Ed.), 293—295; § 181; Wheaton's Int. Law (Boyd's 2nd Ed.), 237; § 177; 1 Phillimore's Int. Law (3rd Ed.), § 188; Hall's Int. Law (3rd Ed.), 153 516; § 41.

and extent, that it would be within the physical competence of the state, possessing the circumjacent lands, to exclude other nations from every portion of such seas; or as Martens puts it, "Partes maris territorio ita natura vel arte inclusæ, ut exteri aditu impediri possint, gentis eius sunt, cuius est territorium circumiacens." Upon this principle, the Bay of Bengal, the Bay of Biscay, the Gulf of St. Lawrence, the Gulf of Mexico, the Gulf of Gascony, the Gulf of Lyons, and many similar portions of the high sea have always been regarded as international waters and excluded from the territories of the adjacent states.

Great Britain has immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of the sea cut off by lines drawn from one promontory to another, and called the King's Chambers. They are considered as included within the bodies of the adjacent counties of the realm, and therefore subject to the operation of the Common law. But the real, and in some cases, perhaps, almost insuperable, difficulty is in determining what bay or gulf should be regarded as included within the territorial dominion of a state. Referring to the Common law of England, we find Lord Hale in his De Iure Maris, laying it down that an arm or branch of the sea which lies within the fauces terrae, so that a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county.[1] This test is indeed extremely vague and indefinite, inasmuch as the distance will clearly vary according to the nature and size of the object to be discerned, although, no doubt, it indicates somewhat Lord Hale's opinion that usage and the mode in which a portion of the sea has been treated as being part of a particular county are material.

In *Reg.* v. *Cunningham*,[2] the question to be determined was whether certain foreigners who had committed a crime in a foreign vessel lying in the Bristol Channel, were subject to the jurisdiction of the Common law Courts in the county of Glamorgan. Although the place where the offence was committed was below low-water mark, beyond any river and at a point where the sea was more than ten miles wide, it was held to be within the county of Glamorgan, and consequently, in every sense of the words, within the territory of Great Britain. Lord Chief Justice Cockburn rested his judgment upon the local situation of that portion of the sea as well as upon the fact that it had always been treated as part

[1] Pt. 1. c. 4; Hargrave's Law Tracts, 10; see also 4 Inst, 140.

[2] Bell, Cr. C. 86.

of the parish of Cardiff, and as part of the county of Glamorgan. This question again arose in a late case[1] before the Privy Council, on appeal from the Supreme Court of the Colony of Newfoundland, with regard to the jurisdiction of that Court over Conception Bay, which lies on the east of that Colony. It is situated between two promontories at a distance of rather more than twenty miles from one another. Its average width is fifteen miles, and the distance of the head of the bay from the two promontories being respectively forty and fifty miles. Lord Blackburn, who delivered the judgment of the Board, said:—"Passing from the Common Law of England to the general law of nations, as indicated by the text-writers on international jurisprudence, we find an universal agreement that harbours, estuaries and bays landlocked, belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'bay' for this purpose." "It seems generally agreed that when the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of one cannon-shot from shore to shore, or three miles; some a cannon-shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg.* v. *Cunningham*,[2] was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays,[3] and Chancellor Kent in his commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable."

"It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down

[1] *Direct U. S. Cable Co.* v. *Anglo-American Telegraph Co.*, 2 App. Ca. (394), 419.

[2] *Supra.*

[3] His Lordship was here referring to Delaware Bay.

a rule, the difficulty of the task would not deter their Lordships from attempting to fulfil it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."

It would seem, therefore, to follow from the above two cases that where the configuration and dimension of any bay are of such a nature as to render it extremely difficult, independently of other considerations, to pronounce an opinion as to whether it belongs to the territory of the adjacent state or not, the habitual assertion by such state of sovereignty and dominion over it, by legislation or otherwise, or by the exercise of jurisdiction over it by its tribunals, if followed by the undoubted acquiescence of other nations in such assertion, may be a sufficient and conclusive guide in determining its territorial character.

These landlocked bays, gulfs and estuaries, unlike the territorial waters on the external coast, are subject to the sovereignty and dominion of the circumjacent state, and consequently to the governance of its municipal law, as fully and completely as are its intra-territorial waters.[1]

The soil of the bed of such bays, gulfs and estuaries primâ facie belongs, in England, to the Crown,[2] and in this country to Government.[3] Before the passing of the statute prohibiting the alienation of Crown lands[4] in England, the soil of such bays, gulfs &c., in any portion of the districtus maris could have been communicated to a subject by charter or grant, provided it did not derogate from, or interfere with, the public

[1] Grotius, de Iur. Bell. et Pac. lib. ii. c. 3. § 10; Vattel's Law of Nations, Bk. i. ch. 23. § 119; Bynkershoek, Quest. Iur. Pub. lib. i. c. 8; Dissertatio de Dominio Maris, c. 2; Wheaton's Int. Law (Boyd's 2nd ed.), 237; § 177; Hall's Int. Law (3rd ed.), 153-156; § 41; 1 Twiss' Law of Nations (2nd ed.), 293-294; § 181.

[2] Hale, de Iure Maris, c. 4; Hargrave's Law Tracts, 10-11. Cf. *The Free Fishers of Whitstable* v. *Gann*, 11 C. B. N. S. 387; see *infra*, Lect. II.

[3] Cf. *Baban Mayacha* v. *Nagu Shravucha*, I. L. R., 2 Bomb. (19) 43.

[4] 1 Anne, c. 7, s. 5.

rights of navigation and fishery over such waters. In the absence of any such statute in this country, it would seem that Government is at liberty to make similar grants to private individuals, unrestrained by any right on the part of the public to fish in such waters[1]—for the Magna Charta does not apply to India—but subject, presumably, to the public right of navigation.

[1] Cf *Baban Mayacha* v. *Nagu Shravacha*, I. L R, 2 Bomb. (19) 44.

LECTURE II.

THE FORESHORE OF THE SEA.

The term 'foreshore' a generic expression—Extent of foreshore of the sea—Law takes notice of only three kinds of tides, the high spring tides, the spring tides, and the neap tides—Landward limit of foreshore of the sea according to Roman law—According to French law—According to English law as defined by Lord Hale—As ultimately determined in *Attorney-General* v. *Chambers*—The seaward limit of foreshore—Ownership of the soil of the foreshore of the sea, according to the Roman law—Discrepancies between the texts relating to this subject—How reconciled by Grotius, J. Voet, Vattel, Schultes and Austin—Ownership of the soil of the foreshore of the sea according to English law—According to the law of France—According to the law in this country—Soil of the foreshore claimable by subject, by grant or prescription—Burden of proof upon the subject, both in England and Scotland—Theories as to the foundation of the primâ facie title of the Crown to the soil of the foreshore—Crown's ownership of the foreshore subject to the public rights of navigation, access and fishery—Crown prevented from making foreshore grants by a statute of Queen Anne—The several acts exerciseable over the foreshore—The value of each of these several acts taken singly as well as jointly—*Attorney-General* v. *James*—*Lord Advocate* v. *Blantyre*—*Lord Advocate* v. *Young*—Nature of the restrictions upon the proprietary title of the Crown or of its grantee to the soil of the foreshore—Right of access to the sea—Right of navigation—*Attorney-General* v. *Richards*—*Mayor of Colchester* v. *Brooke*—*Blundell* v. *Catterall*—Right of the public to fish over the foreshore—Right of the public to take sand, shells, seaweed &c.—No such right claimable by custom, either by the general public, or by any portion thereof without incorporation—The Roman Civil law with regard to wreck—Under English law, wreck primâ facie belongs to the Crown—Different species of wrecks—Right of wreck does not imply right to the foreshore, nor vice versâ—Procedure for custody of wrecks and for making claims thereto—Flotsam, jetsam and ligan, called *droits* of the Admiralty—They belong to the Crown unless the owner can be ascertained—*The Pauline*—The provisions of the English Merchant Shipping Act, 17 & 18 Vict., c. 104 with regard to wrecks—The provisions of the Indian Merchant Shipping Act, VII of 1880, on the same subject.

Under this head I propose to discuss the extent and limits of the foreshore of the sea, of estuaries and arms of the sea;[1] the ownership of the soil of such foreshore; as well as some minor topics connected with this subdivision of law.

[1] The word "foreshore," as defined by the legislature in 29 & 30 Vict. c. 62, s. 7. embraces "the shore and bed of the sea, and of every channel, creek, bay, estuary, and of every navigable river of the United Kingdom as far up the same as the tide flows." Cf. *Mayor of Penryn* v. *Holm*, 2 Ex. D. 328; 46. L. J. Ex. 506; 37 L. J. Ex. 103. *Trustees* v. *Booth*, 2 Q. B. 4.

The expression 'foreshore,' as a term of art, has been introduced into legal language in comparatively recent years, and is not to be met with in the earlier English text-books or reports of decisions on the subject. In its technical import it is more comprehensive than sea-shore,[1] and includes the shore of every bay, estuary and tidal river, channel or creek between high and low-water mark. Though the nature and some of the legal incidents of the foreshore of the sea are, in many respects, similar to those of the foreshore of tidal navigable rivers, yet on the whole it will be deemed far more convenient to deal with them separately.

Extent of foreshore determined by tides.—The waters of the sea are liable to constant fluctuations and subject to ever-recurring changes; sometimes rising above and overflowing the land; sometimes retiring from and leaving the land dry. When examined, these fluctuations and changes are found to present two widely different characteristics. Some of them observe a fixed periodicity and regularity, in consequence of which they may be described as being ordinary; others observe no such periodicity at all; they occur seldom and at irregular intervals, and for this reason may be regarded as being extraordinary. To the former class belong the physical phenomena known by the denomination of tides; under the latter class may be grouped all inundations and floods as well as all sudden and unusual recessions or derelictions of the sea. The manner, extent and permanency of these changes will be found, as we proceed, to govern and determine the ownership of the soil affected by them.

The seashore separates the sea-bottom on one side from what may be called the terra firma or dry land on the other. In common parlance, the sea-bottom refers to the soil which never becomes dry, notwithstanding changes on the surface of the sea; the terra firma imports land wholly exempt from the action of any of the tides; and the seashore denotes such portion of the intervening land as is alternately covered and left dry by the flux and reflux of the tides, comprising within it all that extensive belt of waste ground or strand of sand, shingles and rock liable to the action of every kind of tide. But definitions or rather descriptions of this kind do not convey anything more than a mere general idea of the subject-matter, and can scarcely be said to be adequate for any scientific purpose. We have all observed that the boundary lines which divide the seashore

[1] "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows," Hale, de Iure Maris, p. 1, c. 4; Hargrave's Law Tracts, 12.

from sea-bottom on one side and from terra firma on the other shift and vary with the nature of the tide. It may, therefore, be expected that a strict legal definition of these boundary lines, will be obtained by a consideration of the nature and effect of the several kinds of tides.

Different kinds of tides.—The law in England ignores those tides, or more properly, floods and inundations which are the result of storm or other temporary or accidental circumstances co-operating with the action of the sun and moon upon the ocean, and takes notice of only three kinds of tides :[1]—

1*st.* The high spring tides, which are the fluxes of the sea at those tides which happen at the two equinoctials.

2*nd.* The spring tides, which happen twice every month at the full and change of the moon.

3*rd.* The neap tides, which happen between the full and change of the moon, twice in twenty-four hours.

From these three kinds of tides would seem to result three distinct shores, each differing from, though overlapping, the other. Indeed, the actual tides are far more numerous than these, because we know that, as a matter of fact, the tides of each day differ from one another, in the limits which they reach. But the variations are too small for the law to take notice of them.

Landward limit of foreshore, (a) according to Roman Law.—The Roman law appears to have had adopted the limit of the highest tide in time of storm or winter as the landward boundary of the litus maris or the seashore. Est autem litus maris quatenus hibernus fluctus maximus excurrit.[2]

[1] Hale, de Iure Maris, p. i, c. 6; Hargrave's Law Tracts, 25, 26; *Smith* v. *Earl of Stair*, 6 Bell's App. Cas. 487; Hall on the Seashore (2nd ed.), 10; Morris' Hist. of the Foreshore, 676.

[2] Inst. ii. 1. 2. Litus is defined by Celsus thus:—Litus est, quousque maximus fluctus a mari pervenit. Dig. l. 16. 96 pr. According to Cassius:—Litus puplicum est eatenus, qua maxime fluctus exaestuat. Dig. l. 16. 112. There seems to be some slight divergence of opinion among some of the English authorities on the Civil law as to the proper interpretation to be put upon the passage quoted in the text from the Institutes of Justinian. According to Lord Stair's exposition, which was adopted by Alderson, B., and Maule, J., as well as by Lord Cranworth, L.C., in *Attorney-General* v. *Chambers* (4 De G. M. & G., 206), the definition contained in that passage refers to the highest *natural* tide as distinguished from the highest *actual* tide, for these, it is said, may be produced by peculiarities of wind or other temporary or accidental circumstances concurring with the flow produced by the action of the sun and moon upon the ocean. Cf. Hall on the Seashore, (2nd ed.) 8; Morris' Hist. of the Foreshore, 674. Sandars apparently adopts the same view, for he translates the passage thus:—

(b) **According to French law.**—The law of France, regulated in this respect by the Ordonnances of 1681, declares that the landward limit of the seashore coincides with the line reached by the highest flood of March (*i. e.* when the sun is near the vernal equinox), though on the sides of the Mediterranean, the limit of the seashore still continues to be determined by the rule of the ancient Roman law.[1]

(c) **According to English law.**—Of the three species of tides I have just mentioned, the Common law of England has selected the third, that is, the neap tides for the purpose of fixing the limit of the seashore. That law gives the shore to the Crown, as a part of its royal prerogative, (a topic on which I shall have occasion to dwell later on at some length,) on the principle that it is land so barren and unprofitable as to be incapable of ordinary cultivation or occupation, and therefore to be regarded in the nature of unappropriated soil. If we apply this test to the high spring tides, it is manifest that they can by no means be taken to determine the extent of the seashore, as a part of the royal demesnes, because they frequently overflow ancient meadows and salt marshes which unquestionably belong to the subject. Nor do the spring tides fulfil this test either. In the marshy districts along the coasts of the sea, the lands which are subject to the action of the spring tides are of considerable extent and value, and by no means so barren and unprofitable as the ordinary seashore or strand. These marshes, indeed, are in many places 'manoriable,' to quote Lord Hale's expression,—and the right to embank and enclose them against the fluxes of the spring tides for the purpose of reducing them to a cultivable condition, is of no small importance to

"The seashore extends as far as the greatest winter flood runs up;" (Sandars' Institutes of Justinian, 2nd ed., 168). But Hunter seems to differ from him, for his rendering, *viz.*,—"The seashore extends to the highest point reached by the waves in winter storms," includes the combined effect of the storm and the winter tide. (Hunter's Roman Law, 1st ed., 164). The latter view seems to accord with the interpretation which the modern Continental civilians have put upon the passage, because Moyle, who professedly bases his commentary and the notes on the authority of the Institutional and other treatises of Puchta, Schrader, Baron, and Vangerow, paraphrases "hibernus" to mean 'per hiemem vel ventis excitatus," *i. e.*, in winter or in time of storm. 1 Moyle's Imp. Just. Inst., 183. Lord Cranworth, L. C., in *Attorney-General* v. *Chambers*, remarked that, speaking with physical accuracy, the winter tide was not in general the highest.

[1] Sirey, Les Codes Annotes, v. i, § 538, note (n. 34.) The limit of the seashore is defined by art. 1, tit. 7, Bk. iv of the Ordonnances of 1681. Cf. Ibid., note (n. 38). Lands covered at periodical intervals by the waters of the sea forcing themselves through a fissure in a cliff or breach in an embankment occurring unexpectedly are not reputed seashore. Ibid. note (n. 37.)

the lords of adjacent manors and the owners of adjacent lands. The neap tides, primâ facie, seem to indicate the limits which would satisfy the requirements of the test stated above; and, indeed, Mr. Hall in his Essay on the seashore, written so far back as 1830, following the authority of Lord Hale, states it as good law in his day that, the terra firma and the right of the subject in respect of title and ownership extends down to the edge of the high-water mark of the ordinary or neap tides.

Besides, the older authorities on the Common law uniformly describe the "shore," as that which lies within the "ordinary flux and reflux of the tides."[1] In recent times this definition appears to have been judicially recognized in *Lowe* v. *Govett*[2], in England, and in *Smith* v. *Earl of Stair*,[3] in Scotland. But the final precision was given to it in the subsequent case of *Attorney-General* v. *Chambers*,[4] where, after much doubt and discussion, it was finally settled that the seashore landwards, in the absence of particular usage, is primâ facie limited by the line reached by the average of the medium high tides between the spring and the neap, in each quarter of a lunar revolution during the whole year. There the learned Judges, who assisted Lord Chancellor Cranworth in the determination of this somewhat difficult point, accepting as a sound governing principle, Lord Hale's reason for excluding the spring tides, namely, that the lands overflowed by them are, for the most part of the year, dry and 'manoriable,' that is to say, free from the action of the tides during a greater portion of the year, proposed to themselves for answer the question, 'What are the lands which, for the most part of the year, are reached and covered by the tides?' For lands which are

1 Dyer, 326; 2 Roll. Abr. 2, p. 170, l. 43; *Blundell* v. *Catterall*, 5 B. & Ald., 304; Hale, De Iure Maris, p. 1, c. 4; Hargrave's Law Tracts, 12, 14.

2 3 B. & Ad., 863. Cf. Hale, de Iure Maris, p 1, c. 6; Hargrave's Law Tracts, 12, 26; Hall on the Seashore (2nd ed.), 8; Morris' Hist. of the Foreshore, 674; *Harvey* v. *Mayor of Lyme Regis*, L. R. 4 Ex., 260.

3 6 Bell, App. Cas. 487; 13 Jur., 713.

4 4 De G. M. & G., 206; 23 L. J. Eq., 662; 18 Jur., 779. Prior to this case, this very point had been raised in Scotland in *Smith* v. *The Officers of State for Scotland*, which came before the House of Lords on appeal and is reported in 13 Jur., 713. Sir Fitzroy Kelly argued that the medium line between the springs and the neaps should be taken as the boundary of the property of the Crown. But the House of Lords expressly abstained from intimating any decisive opinion upon it. It is to be noted that in this case Lord Brougham in extremely emphatic and reverent language defended the high authority of Lord Hale's work, De Iure Maris, the authenticity of which, notwithstanding doubts suggested by Serjeant Merewether, Mr. Hall and Sir J. Phear, has at last been conclusively established by Mr. Morris. See his Hist. of the Foreshore, 318.

subject to the action of the tides for the most part of the year, being on that account incapable of cultivation and appropriation in the ordinary modes, must evidently constitute the seashore. Now, strictly speaking, the lowest high tides (those at the neaps) are also as much periodical, and happen as often as the spring tides; consequently, lands covered by them cannot be said to be lands which, for the most part of the year, are reached and covered by the tides. But not so are the medium high tides of each quarter of a lunar revolution during the year. They seem clearly to fulfil this condition. "It is true" said the learned Judges "of the limit of the shore reached by these tides, that it is more frequently reached and covered by the tide than left uncovered by it; for about three days it is exceeded, and for about three days it is left short in each week, and in one day it is reached. This point of the shore, therefore, is about four days in every week, that is for the most part of the year reached and covered by the tides."

Lord Cranworth, L. C., thus stated the principle and the rule:—"The principle which gives the shore to the Crown is that, it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil. Lord Hale gives as his reason for thinking that lands only covered by the high spring tides do not belong to the Crown, that such lands are, for the most part, dry and manoriable; and, taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is that the Crown's right is limited to land which is, for the most part, not dry or manoriable. The learned Judges whose assistance I have had in this very obscure question, point out that the limit indicating such land is the line of the medium high tide between the springs and the neaps. All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line; and I therefore concur with the able opinion of the Judges, whose valuable assistance I have had, in thinking that that medium line must be treated as bounding the right of the Crown."

Seaward limit of foreshore.—For similar reasons, the seaward boundary of the seashore, or in other words, the boundary line which separates the seashore from the sea-bottom, prima facie, in the absence of particular usage, corresponds to the line reached by the average of the medium low tides between the spring and the neap, in each quarter

of a lunar revolution during the whole year. When, therefore, in charters, grants, or other deeds, land is granted either up to the high-water mark or down to the low-water mark, such grants &c. must be understood to convey land in the one case, up to the line reached by the average of the medium high tides, and in the other, down to the line reached by the average of the medium low tides, between the spring and the neap tides, in each quarter of a lunar revolution during the whole year.

The boundary corresponding to the line of the medium low tide between the spring and the neap tides is also of some, though not of quite as much, practical importance as the other boundary line, because the foreshore may be granted by the Crown to one individual and the soil of the bed of any portion of the sea, districtus maris, in what are called the King's Chambers, or the soil of the bed of an arm of the sea, may be granted to another, in which case the boundary line between the two properties would evidently be this line of medium low tide. The importance of this boundary has been further enhanced in consequence of the recent decision in *Reg.* v. *Keyn*,[1] in which, in the absence of statute, the low-water mark has been held to be the limit of the British territory on the external coast, and the limit of the Common law jurisdiction of counties on the sea-coast.

As these lines vary as the sea encroaches on the land or recedes from it, so the boundaries of the foreshore vary with such encroachment or recession of the sea.[2] But the right of the Crown or its grantees to

1 2 Ex. D. 63. Cf. *Blackpool Pier* v *Fylde Union*, 46 L J. M. C., 189, in which the necessity for ascertaining the low-water mark arose, for the purpose of determining whether a pier was out of the realm so as to be exempt from the liability of being rated to the poor as an extra-parochial place under 31 & 32 Vict c. 122, s 27.

2 *Scratton* v. *Brown*, 4 B. & C. 485, where Bayley, J , observes "The Crown by a grant of the seashore would convey, not that which at the time of the grant is between high and low-water marks, but that which from time to time shall be between these two termini." It is described as a "moveable freehold" and its validity supported by a reference to 1 Inst., 486.

The rule of Scotch law is similar to this, for with regard to a charter 'with pertinents' and bounded by the sea (which, according to Scotch law, includes the foreshore down to low-water mark), Lord Glenlee thus observed in *Campbell* v. *Brown*, (17 Fac. Coll. on p. 417), "When a landholder is bounded by the sea, it is true he has a bounding charter. But it is a boundary moveable and fluctuating suâ naturâ; and when the sea recedes, he must be entitled still to preserve it as his boundary. The shore is indeed still publici iuris; but when the sea goes back, the shore advances, and the proprietor is entitled to follow the water to the point to

the foreshore, in those systems of law where the Crown does possess this right, is not affected, unless the alteration in the position of those boundaries takes place by slow and imperceptible degrees.[1]

Ownership of the foreshore of the sea (a) according to Roman law.—Having thus ascertained the limits of the seashore according to the Roman law, the French law and the English Common law respectively, let us now proceed to consider in whom the ownership thereof, according to those systems of law, is vested, as well as what the nature of such ownership is.

Having drawn the distinction between 'res in patrimonio,' *i. e.*, things which admit of private ownership, and 'res extra patrimonium,' *i. e.*, things which do not admit of private ownership, Justinian in his Institutes proceeds to classify 'res extra patrimonium' under four heads, *viz.*,—(i) 'res communes.' *i. e.*, things common to all, (ii) 'res publicae,' *i. e.*, things which are public, (iii) 'res universitatis,' *i. e.*, things belonging to a society or corporation, and (iv) 'res nullius,' *i. e.*, things belonging to no one. With regard to the first, *i. e*, the 'res communes,' he says:—The following things are by natural law common to all,—the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations.[2]

Marcian from whom the above passage in the Institutes is taken, enumerated the 'res communes' thus:—The following things are by natural law common to all—the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access to the seashore for the purpose of fishing, provided he abstains from injury to houses, buildings and monuments; for these are not like the sea itself, subject to the law of nations.[3]

which it may naturally retire, or be artificially embanked." See opinion of Lord Watson in *Lord Advocate* v *Young*, 12 App Ca. (544), 552.

[1] *Rex* v. *Lord Yarborough*, 3 B & C. 91; s. c. in error, 2 Bligh (N. S) 147; *Re Hull & Selby Railway*, 5 M. & W, 327. The law appears to be the same in France, because there if the sea encroaches upon the lands of private owners, such lands become part of the seashore, and subject to the ownership of the state; Sirey, Les Codes Annotes, v. i. § 538, note (n. 38).

[2] Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis abstineat, quia non sunt iuris gentium, sicut et mare. Inst. ii. l. 1.

[3] Marcianus:—Et quidem naturali iure omnium communia sunt illa: aer, et aqua profluens, et mare, et per hoc litora maris. Dig. i. 8. 2. 1.

With regard to the use of the seashore and its ownership, the law is thus stated in the Institutes:—

Again the public use of the seashore, as of the sea itself, is part of the law of nations; consequently every one is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it.[1]

There is another passage in the Institutes taken with slight alteration from the Digest, which has some bearing on this matter. It is as follows:—

Precious stones too, and gems, and all other things found on the seashore, become immediately by natural law the property of the finder.[2]

It is also laid down in the Digest that: If by driving piles one erected a structure upon any part of the seashore, he became owner of the soil (soli dominus), but his ownership lasted so long as the structure stood there.[3]

It is quite evident from the words 'and consequently' (et per hoc), in the context, "the sea, and consequently the seashore" (mare et per hoc litora maris) that, according to Roman law, the seashore was considered as a part of the sea, and not of the adjoining land. It would, therefore, seem to follow that the legal incidents of the seashore would presumably be the same as those of the sea itself. But then, if the sea and the seashore are 'res communes,' *i. e.*, common to all, what is the meaning of the passage last cited, namely, "the *public* use of the seashore, (litorum quoque usus publicus) as of the sea itself, is part of the law of nations"? Are the expressions 'communis' and 'publicus' in the

Marcianus:—Nemo igitur ad litus maris accedere prohibetur piscandi causa, dum tamen villis et aedificiis et monumentis abstineatur, quia non sunt iuris gentium sicut et mare Dig. i. 8. 4. To 'piscandi causâ' Gothofred, on the authority of Theophilus, adds in a note "sed et ambulandi et navis religandae causa."

1 Litorum quoque usus publicus iuris gentium est, sicut ipsius maris: et eb id quibuslibet liberum est casam ibi imponere, in qua se recipiant, sicut retia siccare et ex mare deducere. proprietas autem eorum potest intelligi nullius esse, sed eiusdem iuris esse, cuius et mare et quae subiacent mari, terra vel harena. Inst. ii. 1. 5. Cf. Dig. i. 8. 4; i. 8. 5. 1.

2 Item lapilli gemmae et cetera, quae in litore inveniuntur, iure naturali statim inventoris fiunt. Inst. ii. 1. 18.

Florentinus:—Item lapilli, gemmae, caeteraque, quae in litore invenimus, iure naturali nostra statim fiunt. Dig. i. 8. 3.

3 Dig. i. 8. 6 pr.; xli. 1. 14 pr. et 1.

above passages used synonymously ?[1] The classification of 'res extra patrimonium' by Justinian, to which I have already adverted, shows that 'res publicae' form as distinct a co-ordinate species thereof as 'res communes.' They ought, therefore, to be exclusive of one another. Strictly speaking, 'res communes' refer to things which are common to all mankind, and 'res publicae' denote things which belong to, and are used by, the state as a private person, as well as things which are publico usui destinatae, *i. e.*, things, the use whereof belongs to the cives, *i. e.*, all the members of the state, and not to 'communes,' *i. e.*, mankind in general. This verbal discrepancy may possibly be reconciled by the suggestion that the less is included in the greater; that 'usus publicus' is included in 'usus communis,' that although the use of the seashore is common to all mankind, it is not incorrect to say that the use of it is common to all the members of the state, (*i. e.*, the Roman Empire) who form a part of mankind in general.

This community of the seashore is rendered more explicit by Neratius, who says that they are not public in the same sense as those things which are the property of the people at large, (that is to say, as belonging exclusively to a particular state), but in the sense of things provided originally by nature, and not yet brought under any man's ownership.[2]

But if the seashores are 'res communes,' *i. e.*, belonging to all mankind, they must necessarily be beyond the jurisdiction and dominion of the Roman Empire. This, however, seems to be contrary to what Celsus declares:—"It is my opinion that through the whole extent of the Roman Empire, the seashores belong to the Romans; the use of the sea, like that of air, is common to all mankind."[3] It is also inconsistent with what Pomponius says:—"Although what is built by us on the public seashore or in the sea is our own, yet the Prætor's leave must be obtained, in order that such act may be lawful."[4]

[1] Barbeyrac in a note to Grotius, de Iur. Bell. et Pac., lib. ii, c. 3. § 9, states that Noodt, in his Probabilia Iuris, lib. i. cc. 7, 8, has proved at large that, according to the language of the ancients on this subject, the terms public and common meant the same thing. And he apparently shares the same opinion.

[2] ——————— nam litora publica non ita sunt, ut ea, quae in patrimonio sunt populi, sed ut ea, quae primum a natura prodita sunt et in nullius adhuc dominium pervenerunt, Dig. xli. l. 14 pr.

[3] Litora, in quae populus Romanus imperium habet, populi Romani esse arbitror. § 1 Maris communem usum omnibus hominibus, ut aeris. Dig. xliii. 8. 3.

[4] Quamvis quod in litore publico vel in mari extruxerimus nostrum fiat, tamen decretum praetoris adhibendum est, ut id facere liceat. Dig. xli. 1. 50.

Reconciliation of conflicting texts.—Grotius reconciles this conflict of texts by holding that Neratius meant the shore only so far as it is serviceable to those who sail or pass by, but that Celsus spoke of the shore in so far as it is appropriated to some use, as when one builds a structure upon it.[1]

Thus Grotius' view of the Roman law on this subject was, that according to it, the dominion of the Roman Empire over the seashore extended as far as it was actually appropriated by the Roman people.

J. Voet thought that, according to Roman law, the seashore belonged to the people of Rome in this sense, that they could prevent the approach of persons to it, who came there to infest or molest the dwellers on the coasts; that the jurisdiction, which Celsus declared the Roman people possessed over the seashore, was of the same kind as that which Antoninus claimed for himself over the world; that it was merely expressive of the idea of supremacy, and did not include the notion of property.[2]

Vattel thinks that, according to the Roman jurists, the shores of the sea were common to all mankind only in regard to their use; that they were not to be considered as being independent of the Empire.[3]

Schultes states that the gloss upon the Pandects of Justinian[4] (in the Bibliotheca Bodleiana) shows that the ancient civilians considered the seashore and the adjoining sea as being in the protection and under the jurisdiction of the king; and that they have described the sea in regard to its property, use and jurisdiction thus:—'Mare est commune quoad usum, sed proprietas est nullius, sicut aer est communis usu, proprietas tamen est nullius, sed jurisdictio est Caesaris.'

The expression 'res publicae,' according to Austin, has a larger as well as a narrower signification. In the larger sense, all things within the territory of the state are 'res publicae', or belong to the state, in the sense that, it is not restrained by positive law from using or dealing with

1 Grotius, de Iur. Bell. et Pac., lib. ii, c. 3. § 9, 2.

2 Ita quoque populi Romani fuit, ad littora sua appulsum denegare nocituris et turbaturis accolarum quietem. Nec alio sensu Celsum in l. littora, 3 ff ne quid in loc. publ. fiat. Scripsisse arbitror littora, in quae populus Romanus imperium habet, populi Romani esse, quam quod in littora illa, quibus aeque ac Oceano Romana terminabatur potestas, et á gentium aliarum terris separabatur, hanc jurisdictionis speciem populus exercuerit; sicut dominium, quod aiunt, superioritatis, non proprietatis, ei Celsus tribuerit; eo modo, quo sibi Antoninus mundi adrogavit dominium in l. 9, ff de lege Rhod. de jactu. J. Voet, Comm. ad Pand, lib. i, t. 8, § 3.

3 Vattel's Law of Nations, Bk. i, c. 23, § 290.

4 Dig. i. 8. 3; Vinnius, Comm. ad Instit., lib. ii, t. 1, § 18.

them as it may please. In the narrower sense, it refers to those things which the state reserves to itself. Of the latter, there are some which it nevertheless permits its subjects generally to use or deal with in certain limited and temporary modes. The shores of the sea (in so far as they are not appropriated by private persons,) come within this class of things. He says that 'res publicae', in this latter sense are commonly styled 'res communes,' and that the opinion of the Roman lawyers, that the title of the subjects to the use of 'res communes' was anterior to any that the state could impart, is erroneous.

It has been thought by some writers that the modern doctrine, that the seashore belongs to the state, has been derived from Celsus. But whether this is so or not, it is clear that Austin's view as to the nature of the ownership of the seashore is the inevitable corollary of his system of positive jurisprudence.

(*b*) **According to English law.**—However difficult it may be, amid this conflict of texts and discordance of opinions among the modern civilians to spell out with accuracy the doctrine of the Roman law, the Common law of England on this topic has, from the earliest times, been uniformly clear and consistent. Even Bracton, the earliest writer on the Common law, who is considered to have laid down very nearly the same doctrine on this matter as the ancient civilians did,—indeed, he has been accused by Sir Henry Maine[1] of having directly borrowed from the Corpus Iuris 'the entire form and a third of the contents' of his treatise on English law—said only as follows: Indeed by natural law the following things are common to all:—running water, the air, the sea and the shores of the sea which are, as it were, accessories of the sea. No one is forbidden access to the shores of the sea provided he abstains from injury to houses and buildings generally, because the shores of the sea, like the sea itself are by the law of nations common to all.[2] He did

[1] Ancient Law (4th ed.) 82. In *Benest* v. *Pipon*, 1 Knapp, 60, Lord Wynford, on p. 70, observed "whoever indeed will take the trouble to read Bracton, and our other early writers on the Common law, will be surprised to find the number of doctrines they have adopted, and even whole passages that they have transcribed from the Civil law." See 1 Law, Q. R., 425 (where Mr. Scrutton, after a careful comparison of a large portion of the text of Bracton with that of the Institutes, remarks that Sir Henry Maine's estimate of Bracton's indebtedness to Roman law is excessive); Scrutton, Roman Law in England, 79-121; Bracton's Note Book' (Ed. Maitland), Introd., 10.

[2] Naturali vero iure communia sunt omnia haec,—aqua profluens, aer, et mare, et litora maris, quasi maris accessoria. Nemo enim ad litora maris accedere prohibetur, dum tamen a

not add the remainder of the passage from the Civil law, *viz.*,—'but they cannot be said to belong to any one as private property',[1] thereby suggesting the inference that even he did not mean to deny that the ownership of the shores of the sea rested with the king; the use merely, according to him, being common to all.[2]

The soil of the foreshore of the sea, of estuaries and arms of the sea as well as of tidal navigable rivers, is, according to the law of England, primâ facie vested in the Crown[3] by virtue of its prerogative.[4] "Rex in ea

villis et aedificiis abstineat, quia litora sunt de iure gentium communia, sicut et mare. Bracton, lib. ii. f. 7, § 5.

[1] Proprietas autem eorum potest intellegi nullius esse. Inst. ii. 1. 5.

[2] Hall on Seashore (2nd ed.), 105. Mr. Morris controverts Mr. Hall's argument by remarking that Bracton omitted the passage in the Institutes because he must have been well aware that, throughout the kingdom the foreshore, in point of property, was in very numerous places vested in the lords of manors, although subject to the right of the public to use it for certain purposes. Hist. of the Foreshore, 31-33.

[3] *Mayor of Penryn* v. *Holme*, 2 Ex. D., 38; *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C., 192; *Attorney-General* v. *Parmeter*, 10 Price, 378; *Blundell* v. *Catterall*, 5 B & Ald., 268; *Attorney-General* v. *Chambers*, 4 De G., M. & G., 206; *Bagot* v. *Orr*, 2 Bos. & Pull., 472; *Mayor of Colchester* v. *Brooke*, 7 Q B., 339; *Williams* v. *Wilcox*, 8 Ad. & El., 314; *Mayor of Carlisle* v. *Graham*, L. R., 4 Ex., 361; *Sir Henry Constable's case*, 5 Rep. 106a; Dyer, 326; *Attorney-General* v. *Burridge*, 10 Price, 350; *Lopez* v. *Andrew*, 3 Man. & Ryl, 329; *Lowe* v. *Govett*, 3 B. & Ad., 863; *Scratton* v. *Brown*, 4 B. & C., 485; *Somerset* v. *Fogwell*, 5 B. & C., 883; *Attorney-General* v. *London*, 1 H. L. C., 440; *In re Hull & Selby Railway Co.*, 5 M. & W., 327; *Benest* v. *Pipon*, 1 Knapp., 60; *Attorney-General* v. *Tomline*, 12 Ch. D., 214; 14 Ch. D., 58; *Dickens* v. *Shaw*, Hall on the Seashore (2nd ed.), Apdx.; Hale, de Iure Maris, p. 1, c. 4; Hargrave's Law Tracts, 11, 12; 1 Bla. Com., 110, 264; 8 Bacon's Abr. tit. Prerogative, B. 3; 5 Com. Dig., Navigation, A. B; 1 Kent, Com. 367; 3 Kent, Com., 427, 431; Chitty on Prerogative, 207. Cf. *Malcolmson* v. *O'Dea*, 10 H. L. C., 593; *Bristow* v. *Cormican*, 3 App. Ca., 641; *Neill* v. *Duke of Devonshire*, 8 App. Ca., 135. Mr. Morris has by an elaborate historical examination of all the cases and old records relating to foreshore, endeavoured to prove that the theory of the primâ facie title of the Crown thereto was unknown in England down to the time of Queen Elizabeth, that it was invented for the first time by Mr. Digges in the year 1568, and that it is directly opposed to the actual state of things, because, as he afterwards proceeds to shew, the Crown has to a very large extent granted away the foreshore, and that very little, if any, of it in fact remains vested in the Crown. History of the Foreshore, Introd. i—liv, 638-644. He has also shewn by a review of some of the Scotch cases, that the primâ facie theory was equally unknown in Scotland, until 1849, when it was introduced by a dictum of Lord Campbell in *Smith* v. *Earl of Stair* (6 Bell's App. Cas., 487). Ibid., 573-591.

[4] "By the word 'prerogative' we usually understand," states Sir William Blackstone, "that special pre-eminence which the king hath over and above all other persons and out of the ordinary course of the Common law, in right of his royal dignity. It signifies, in its etymology, (from prae and rogo) something that is required or demanded before, or in pre-

habet proprietatem, sed populus habet usum ibidem necessarium,"[1] is the aphorism of Callis. It is so vested not for any beneficial interest to the Crown itself, but for the purpose of securing to its subjects collectively all the advantages and privileges which can accrue from such property. "All prerogatives," says Bacon,[2] "must be for the advantage and good of the people; otherwise they ought not to be allowed by law." "This prerogative power" says Mr. Chitty "is vested in the king as the protector of his people, and guardian of their rights. It is subservient, however, to those jura communia, which nature and the principles of the constitution reserve for His Majesty's subjects. It can neither prevent them from trading or fishing."[3]

Consequently, this prerogative cannot be exercised so as in any way to derogate from, or interfere with, these privileges of the public, consisting chiefly of the right of navigation, access and fishing.

(c) **According to French law.**—Under the law of France too, the right to the foreshore of the sea is vested in the state[4] and may be communicated to a subject by means of a grant (concession).[5]

(d) **According to the law in this country.**—In this country the primâ facie title of the Crown to the foreshore of the sea and its arms has not yet been expressly affirmed in any judicial decision. But it is conceived that, whenever the question arises, the rule of English law will be followed, as the primâ facie title of the Crown to the foreshore of tidal navigable rivers, which is a branch of the same rule and dependent upon the same principles as those on which the title to the foreshore of the sea rests, has, as will be shown later, clearly been adopted by the Courts in India.

Foreshore claimable by subject by grant or prescription.—To return to English law: Although the Crown has, primâ facie, this right to the foreshore, yet a subject may have it either by ancient grant or charter or by prescription.[6]

"The sea," said Lord Wynford, in delivering the judgment of the Privy Council in *Benest* v. *Pipon*,[7] is the property of the king, and so is

ference to all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others." 1 Bla. Com., 250.

[1] Callis on Sewers, 55. [2] Bac. Abr. tit. Prerogative, p. 1. [3] On Prerogative, 173.

[4] Code Napoleon, § 538. [5] Siroy, Les Codes Annotes, v. i. § 558, note (nos. 40, 42).

[6] Hale, de Iure Maris, p. i, c. 5; Hargrave's Law Tracts, 17, 18; *Sir Henry Constable's case*, 5 Rep., 107; *Duke of Beaufort* v. *Swansea*, 3 Ex. 413; *Calmady* v. *Rowe*, 6 C. B. 861.

[7] 1 Knapp, 60.

the land beneath it, except such part of that land as is capable of being usefully occupied without prejudice to navigation, and of which a subject has either had a grant from the king, or has exclusively occupied for so long a time as to confer on him a title by prescription: in the latter case a presumption is raised that the king has either granted him an exclusive right to it, or has permitted him to have possession of it, and to employ his money and labour upon it, so as to confer upon him a title by occupation, the foundation of most of the rights of property in land. This is the law of England, and the cases referred to, prove that it is the law of Jersey."

The law of Scotland,[1] upon this point, is the same as that of England; and in both countries, at all events since 1849, the presumption is the same, namely, that the foreshore still belongs to the Crown; and in every case where the subject claims the ownership thereof, the burden is thrown upon him to prove that by charter, grant or prescription it has passed to him.[2]

Theories as to the foundation of prima facie title of the Crown.—Various reasons have from time to time been assigned by judges as well as by text writers for the existence of this right of the Crown to the foreshore. Under the fiction of the feudal law by which all lands in the kingdom are, immediately or ultimately, derived from the king, as lord paramount, the shores and bed of tide waters having no other acknowledged owner are said to have remained vested in him in all cases where he is not shown to have granted them away. The aphorism of Lord Wynford, 'what never has had an individual owner belongs to the sovereign within whose territory it is situated,' evidently borrowed from the writings of Grotius and Puffendorf, the famous expounders of the law of nature, and applied by him to support the prerogative right of the Crown to the land beneath the sea, is merely a logical

[1] Bell's Principles, § 642; Craig's Ius Feudale, lib. i. t. 15. § 12; *Gammel* v. *Commissioners of Woods and Forests*, 3 Macq., 419; *Smith* v. *Officers of State*, 13 Jur., 713; 6 Bell, App. Cas., 487; *Lord Advocate* v. *Blantyre*, 4 App. Ca., 770; *Lord Advocate* v. *Young*, 12 App. Ca., 544.

[2] *Attorney-General* v. *Richards*, 2 Anst., 606; *Scratton* v. *Brown*, 4 B. & C., 485; *Somerset* v. *Fogwell*, 5 B. & C. 875; *Dickens* v. *Shaw*, Hall on the Seashore, Apdx. lxvii; *Blundell* v. *Catterall*, 5 B. & Ald., 268; *Attorney-General* v. *Parmeter*, 10 Price, 378; *Lopez* v. *Andrew*, 3 Man. & Ryl., 329. As to the presumption in Scotland, see *Smith* v. *Officers of State*, *supra*; *Lord Advocate* v. *Young*, *supra*. Until the year 1849, the presumption of law in Scotland was that the seashore had been granted to the subject as 'part and pertinent of the adjacent land, subject to the Crown's right as trustee for public uses'. Bell's Principles, §§ 642, 647. See also cases cited in Morris' Hist. of the Foreshore, 575—576.

deduction from the doctrine of territorial sovereignty, shown by Sir Henry Maine to be distinctly an offshoot, though a tardy one, of feudalism.

Serjeant Woolrych thinks that the king was once in reality the master, as well in right of territory as in right of prerogative, of all the lands within his dominion; that the needy condition of the monarchs and the constant demand for money, in early days, tempted them to dissever their possessions, and that thus in process of time there remained but a small territory which is now known by the terms of Crown or demesne lands, which include the seashore and the soil of tidal waters[1]. Somewhat different, however, is the theory propounded by Mr. Chitty as to the origin of the Crown lands[2].

Mr. Jerwood suggests that at the time of the Norman conquest, William I, having acquired by confiscation all the estates in England, retained in his own possession those lands, including the foreshore, which were not distributed among his followers[3].

The doctrine of the Crown's title as universal occupant, postulated in the formula 'what never has had an individual owner belongs to the sovereign within whose territory it is situated', has been expressly dissented from by Lord Blackburn in a recent case[4] before the House of Lords. In the opinion which his Lordship gave, after quoting Mr. Justice Lawson's remark,—"What ground is there for suggesting that the title" (in that case, the title to the soil of a lake) "was not in the Crown? It is not shown or even suggested to be in any other, and it could not be in the public"—he observed:—"This would be a strong remark if there was any authority for saying that by the prerogative, the Crown was entitled to all lands to which no one else can show a title. But this is so far from being the case, that in the only instance in which no one could show a title, I mean that of an estate granted to one for the life of another, where the grantee died leaving the cestui que vie, the law cast the freehold on the first occupant of the land.[5] It was never thought that the Crown was entitled in such a case."

Nature of the right of the Crown.—If the ownership of the Crown over the foreshore is merely that of a trustee, and the public at large are its cestuis que trustent,[6] it follows that the Crown can make no grant, nor can a subject assert a claim by prescription, (which, indeed, presupposes such a grant), of any portion of the foreshore freed from the

[1] Woolrych on Waters (2nd. ed), 434.
[2] Chitty on Prerogative, 202-203.
[3] Jerwood on the Seashore, 20-29.
[4] *Bristow v. Cormican*, 3 App. Ca , (641), 667.
[5] See Co. Litt, 40.
[6] Phear on Rights of Water, 52.

rights or privileges of the public in respect of navigation, access and fishery.[1]

But such was not the view which the English monarchs in the early days took of their prerogative rights. Unrestrained by the constitutional fetters which popular movement afterwards succeeded in imposing on the royal prerogatives, the English monarchs made grants of foreshores to their subjects, with exclusive rights of fishing over them by means of appliances which were calculated to obstruct or impede the public right of navigation.[2] These were forbidden by the Great Charter, which declared that "all weirs[3] from henceforth shall be utterly put down, by Thames and Medway, and through all England, but only by the sea-coast."[4] But these grants had been so long enjoyed without interruption, that the legislature, though restraining by a statute passed in the reign of Edward III, the erection in future of any kind of obstruction to the enjoyment of the public right of navigation, thought fit to legalize all weirs, gorges &c. which had been erected and exercised before the commencement of the reign of Edward I.

Claim to foreshore by grant.—As I have already said, a subject may claim any portion of the foreshore of the sea under an express grant from the Crown, either (i) as parcel of a manor,[5] or of an adjoining freehold, or (ii) in gross. Claims to the foreshore, however, are as a matter of fact invariably made by lords of manors, in right of their manor.[6]

It would not serve much useful purpose at this day, if I were to take you through the various English cases on the construction of technical expressions used in ancient foreshore grants in gross and grants of manors on the coast. It is, however, important to bear in mind the general

[1] See *Free Fishers of Whitstable* v. *Gann*, 11 H. L. C, 192; *Free Fishers of Whitstable* v. *Foreman*, L. R., 2 C. P., 688; L. R., 3 C. P., 578.

[2] Phear on Rights of Water, 50.

[3] Fixed apparatus for exclusive fishing. Structures projecting into the sea or stream from which the fishermen launched their boats and cast their nets or conducted other fishing operations. See *Malcolmson* v. *O'Dea*, 10 H. L. C., 619, 620; *Neill* v. *Duke of Devonshire*, 8 App. Ca, 135.

[4] 2 Co. Inst. 37. This statute was followed by others which were more effectual, *viz.*, 25 Ed. 3, c. 3; 1 H. 4, c. 12; 12 Ed. 4, c. 7.

[5] The two most prevailing divisions of landed property in England are, (1) manors, which are tracts of freehold land, accompanied by peculiar rights and privileges, and (2) naked freeholds, or freehold lands unaccompanied by any such manorial rights and privileges. Copyholders are mere tenants of the lords of a manor.

[6] Hall on the Seashore (2nd ed.), 17; Morris' Hist. of the Foreshore, 683.

canon of construction, which, after considerable vacillation of opinion, has at last been judicially settled. Until a comparatively recent period the rule established by the general current of authorities was that, grants from the Crown are to be construed strictly and in favour of the Crown; more specially, when they are in derogation of the prerogative of the Crown and in defeasance of the right of the public.[1] But the Privy Council[2] has laid down that the same rules of common sense and justice must apply in the construction of a deed, whether the subject-matter of construction be a grant from the Crown or from a subject—it being always a question of intention to be collected from the language used with reference to the surrounding circumstances. In England, one established rule of construction applicable to grants of sea-coast manors is, that if the boundary be expressed to be down to the sea, it is presumed that the ordinary high-water mark (or, to be more precise, the medium line of high tides between the springs and the neaps) is intended as the boundary line; but if it be expressed to be down to low-water mark, it will include the foreshore.[3]

For a long time the sovereigns of England enjoyed absolute and uncontrolled freedom in making whatever grants they chose of the royal demesnes including the foreshore; but after William III had greatly impoverished the Crown by such grants, Parliament was obliged to interfere and pass a statute,[4] in the reign of Queen Anne, prohibiting the alienation of Crown lands with certain specified exceptions. So much, therefore, of the foreshore as had not been actually aliened by grant and bestowed on lords of manors and other subjects before that period, still remains vested in the Crown,[5] incapable of alienation by it. But it is clear that with

[1] *Royal Fishery of the Banne*, Sir John Davies, 149; *Somerset* v. *Fogwell*, 5 B. & C., 875; *Attorney-General* v. *Farmen*, 2 Lev., 171; Hall on the Seashore (2nd Ed.), 20; Morris' Hist. of the Foreshore, 686—687; Jerwood on Seashore, 60; Forsyth's Constitutional Law, 175; *R.* v. *Mayor of London*, 1 Cr. M. & R., 12; *R.* v. 49 *Casks of Brandy*, 3 Hagg. Adm. R., 271; Feather v. *R.*, 6 B. & S. 283; 35 L. J. Q. B., 204.

[2] *Lord* v. *Commissioners of Sydney*, 12 Moo., P. C. C., 496. In the construction of statutes, however, the recognised rule has been that the prerogative of the Crown cannot be taken away except by express words or necessary implication. *Woolley* v. *Attorney-General of Victoria*, 2 App. Ca., 163.

[3] *Corporation of Hastings* v. *Ivall*, L. R., 19 Eq., 558.

[4] 1 Anne, c., 7. s. 5; see *Doe, d. R.* v. *Archbishop of York*, 14 Q. B., 81; Hall on the Seashore (2nd Ed.), 106; Morris' Hist. of the Foreshore, 781-782; Chitty on Prerogative, 203.

[5] The management of the rights and interests belonging to the Crown, in the shores and bed of the sea and the rivers of the United Kingdom as far as the tide flows, was by 29 & 30

the sanction of Parliament, the Crown can still aliene any portion of the foreshore; for though the Crown may not of its own authority part with any of its prerogatives, yet when the Crown has acted under the authority of Parliament, such alienation is valid.[1]

Claim to foreshore by prescription—As I have already observed, a subject may also claim a portion of the foreshore by user and prescription, and that again either (i) as parcel of a manor or of an adjoining freehold, or (ii) in gross. It should be borne in mind that although in English law, the term 'prescription' is generally used in a technical sense, as referring to the mode of proof employed to establish what are called incorporeal rights, *e. g.*, easements, profits a prendre &c., yet it is sometimes also used in a general and a wider sense to express merely that the right in question could not be assailed after immemorial enjoyment or enjoyment for a defined statutory period.[2]

The several acts of user or of ownership for the exercise of which the foreshore of the sea appears to afford scope are chiefly these:—(*a*) taking wreck; (*b*) taking royal fish; (*c*) the various incidents of a port; (*d*) fishing; (*e*) mining, digging and taking sand, gravel, sea-weed, &c.; (*f*) egress and regress, and right of way for the purpose of navigation, fishing, bathing and other uses of the sea; (*g*) taking of anchorage and groundage of vessels upon the foreshore; (*h*) embanking and enclosing; and (*i*) punishing purprestures or intrusions, *i. e.*, trespasses.[3]

Lord Hale says: "It"—that is, the shore—"may not only belong to a subject, in gross, which possibly may suppose a grant before time of memory, but it may be parcel of a manor." "And the evidences to prove this fact are commonly these; constant and usual fetching gravel,

Vict. c. 62, s. 7, transferred from the Commissioners of the Woods and Forests to the Board of Trade, who are thereby directed to protect the Crown's rights, to ascertain in what parts of the coast the Crown has parted with its rights, in what parts the rights of the Crown are undoubted, and in what part the title is doubtful; to prevent encroachments on the foreshore, to protect navigation and other public interests, and to sell or lease in certain cases with certain specified restrictions. Cf. 48 & 49 Vict. c. 79.

[1] *Cavilier* v. *Aylwin*, 2 Knapp, 72; *Reg.* v. *Eduljee Byramjee*, 3 Moo. Ind. App., 468; 5 Moo., P. C. C., 294; *Reg.* v. *Aloo Paroo*, 3 Moo. Ind. App., 488; 5 Moo., P. C. C., 296. The following cases show that the prerogative of the Crown to hear appeals cannot be taken away except by express words in a statute. *Cushing* v. *Dupuy*, 5 App. Ca., 409; *Johnston* v. *The Minister & Trustees of St. Andrew's Church*, 3 App. Ca. 159; *Theberge* v. *Laudry*, 2 App. Ca., 102; *In re Louis Marois*, 15 Moo., P. C. C., 189.

[2] Phear on Rights of Water, 68.

[3] Ibid., 89; Morris' Hist. of the Foreshore, 657—661.

and sea-weed, and sea-sand between the high-water and low-water mark, and the licensing others so to do; enclosing and embanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sands; presentment and punishment of purprestures there, in the court of a manor, and such like;" and he adds, "it not only may be parcel of a manor, but de facto, it many times is so; and perchance it is parcel of almost all such manors as, by prescription, have royal fish, or wrecks within their manors. For, for the most part, wrecks and royal fish are not and indeed cannot be well left above the high-water mark, unless it be at such extraordinary tides as overflow the land: but these are perquisites which happen between the high-water and low-water mark; for the sea, withdrawing at the ebb, leaves the wrecks upon the shore, and also those greater fish which come under the denomination of royal fish. He, therefore, that hath wrecks[1] of the sea or royal fish by prescription infra manerium, it is a great presumption that the shore is part of the manor, or otherwise he could not have them."[2]

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A few explanatory remarks upon some of the technical expressions I have just used in enumerating the several acts of user or of ownership, may perhaps be thought desirable before I proceed to discuss the question of prescription. The subject of wrecks in general requires a fuller treatment and I propose to deal with it at a later stage of this lecture but for our present purpose, wreck in its specific sense, may be taken to refer to unclaimed ships, and cargo cast on the shore. It belongs to the Crown, as a part of its royal prerogative.

Whale, sturgeon, and porpoise are called royal fishes, and whenever and by whomsoever they are caught in the British seas, they become the property of the Crown by royal prerogative too.[3] They constitute a part of the ordinary revenue of the Crown, and do not belong to it by virtue of, or as incident to, the ownership of the soil of the foreshore. The Crown may grant the foreshore as well as the wreck and the royal fish to the same person, or it may grant them separately to different persons; or it may reserve the foreshore and grant the wreck and the royal fish

[1] *Sir H. Constable's case*, 5 Rep. 107; *Calmady* v. *Rowe*, 6 C. B., 891; *Rex* v. *Ellis*, 1 M. & S. 662; see Round on Riparian Rights, 14.

[2] Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 26, 27.

[3] The prerogatives of royal mines, treasure-trove, and royal fish are not enjoyed by the sovereign in all or even in most countries, and they have not been extended to the East Indian possessions of the British Crown. See *Mayor of Lyons* v. *The East India Company*, 1 Moo., Ind. App., (175) 280, 281; 1 Moo. P. C. C. 175.

only, or vice versâ. When a prerogative right is granted to a subject it is called a franchise.

The privilege of erecting ports at which customable goods may be landed, and of taking dues and tolls as incident thereto, is also a part of the royal prerogative and may be communicated to a subject, as a franchise, without granting any right to the soil, or both may be granted to the same person, or separately to different persons.

Purprestures are encroachments (by the making of enclosures, wharfs, piers, or other similar structures) on the proprietary rights of the Crown in the demesne lands, or in the public rivers, harbours, or highways.[1] They differ from public nuisances, which are violations of, or encroachments on, the rights of the public. The distinction may be thus illustrated. When the owner of the adjoining terra firma, without grant or licence from the Crown, extends a wharf or building into the water in front of his land, it is a purpresture, though the public rights of navigation and fishery may not be impaired.[2] When such a structure interferes with the exercise of the public rights of navigation and fishery or causes injury to any other public rights, it is called a public nuisance. Thus an encroachment may be both a purpresture and a public nuisance. Lords of manors, which include the foreshore, possess the jurisdiction, in their manor courts, of presenting, punishing and putting down inclosures made, or obstructions placed, on the foreshore. Presentment and punishment of purprestures by the lord of a manor, is very good evidence to show that the foreshore on which these trespasses are committed, is a part of the manorial waste.

It is thus evident that neither the taking of wreck, nor royal fish, nor the erecting of ports and taking tolls and dues therein can be adduced as unequivocal evidence of the ownership of the soil of the foreshore. Sir John Phear says, that they cannot be adduced as any evidence of title to the shore, but this statement would perhaps require some qualification,

[1] 2 Co. Inst. 38, 272; Co. Litt. 277*b*; 4 Bla. Com., 167; Hall on the Seashore (2nd ed.), Apdx. l. (note). "Purprestura cometh of the French word *purprise*, or pourpris, which signifieth an enclosure or building, and in legal understanding signifieth an encroachment upon the king, either upon part of the king's demesne lands of his Crown which are accounted in law as *res publicae*; or in the high-wayes, or in common rivers, or in the common streets of a city, or generally when any common nusans is done to the king, and his people, endeavouring to make that private, which ought to be publique." 2 Co. Inst. 272.

[2] Hale, de Portibus Maris, p. 2 c. 7; Hargrave's Law Tracts, 84; Callis on Sewers, 174-175; Woolrych on Waters (2nd ed.), 193-196.

inasmuch as in the case of *Dickens* v. *Shaw*[1] the Court was clearly of opinion that, the taking of wreck by the lord of a manor was evidence of the ownership of the soil of the shore, particularly if it was coupled with other acts of enjoyment, though, no doubt, it also held that taken alone it was not sufficient to confer a title by prescription.

In the same manner, the ownership of a several or exclusive fishery whether in tidal or in non-tidal waters, does not necessarily import the ownership of the subjacent soil.[2] The right to the exclusive fishery and the right to the soil are sometimes found associated in the same person, in which case it is aptly styled "a territorial fishery," but there are, on the other hand, many instances in which they are found disunited, in which case the right to the fishery is regarded as a profit à prendre in alieno solo. The evidence of the ownership of the soil of the foreshore furnished by exclusive fishing cannot therefore be said to be unambiguous in its character. It is otherwise, however, if this exclusive right of fishing is exercised by means of weirs and fixed engines. In that case a very strong inference as to the ownership of the soil arises.[3] According to the latest decisions in England, there is ordinarily a presumption that the several or exclusive fishery carries with it a right to the soil.[4] But the Privy Council has on appeal from Indian cases held that no such presumption exists.[5]

Mining, digging and taking sand, gravel and sea-weed &c. for building, ballast, manure, and so forth are all acts, which are as much likely to be done by the owners of the soil, as by persons possessing the limited rights of profit à prendre; they may also be usurpations or intrusions on the ownership of the Crown, and oftentimes they are so. A custom to dig and take coal or minerals, or sand or gravel or sea-weed, &c. from the foreshore is analogous to the customary right of digging coal or minerals or turf or brick-earth or sand in the waste lands of a manor by the customary tenants. These acts, therefore,

[1] Hall on the Seashore (2nd ed.), Apdx. xlv.

[2] Ibid.

[3] Morris' Hist. of the Foreshore, 658.

[4] *Holford* v. *Bailey*, 8 Q. B. 1000; 13 Q. B. 427; *Marshall* v. *Ulleswater Navigation Co.*, 3 B. & S., 732, 748; 6 B. & S., 570, (in this case Cockburn, C. J. differed from the rest of the Court); Hall on Seashore (2nd ed.), 45-81; *The Duke of Somerset* v. *Fogwell*, 5 B. & C., 875; *Scratton* v. *Brown*, 4 B. & C., 485; *R.* v. *Ellis*, 1 M. & S., 662.

[5] *Forbes* v. *Meer Mahomed Hossein*, 12 B. L. R., 210; 20 Suth. W. R., 45; *Rajah Burda Kant Roy* v. *Baboo Chunder Kumar Roy*, 12 Moo. Ind. App., (145) 155; 2 B. L. R., (P. C.) 1; 11 Suth. W. R., (P. C.) 1.

do not necessarily indicate absolute ownership of the soil in the person who exercises them, but are compatible with the existence of such absolute ownership in some other person. As to egress and regress and right of way for the purposes of navigation and fishing, bathing and other uses of the sea, these acts, like those I have just mentioned, are likely to be done by the owners of the soil, but it is also possible that they may be done by persons who are entitled to mere easements.

Taking salvage for the grounding of ships may possibly be a mere liberty or license, but it is more in the nature of a proprietary act.

Lastly, as to embanking and enclosing and punishing purprestures or intrusions. These are undoubtedly acts of appropriation and do not in any way partake of the nature of liberties, licenses, profits or easements. It is impossible to construe them otherwise than as pure proprietary acts, done either by the actual owner of the soil or by intruders, who must be presumed to have done them with the intention of acquiring actual ownership therein.

Nature of evidence required to establish title by prescription.—Mr. Hall in his learned essay on the seashore has elaborately discussed the question whether a subject may by prescription and user acquire a right to the seashore as against the Crown. He thinks that the various acts, which I have mentioned above, with the exception of the last one, are separable from the ownership of the soil and do not necessarily imply a title to it; and strongly maintains the position that the seashore being in its nature land, nothing short of evidence of adverse occupation and actual possession of the soil continued for a period of sixty years ought to be permitted to prevail against the primâ facie title of the Crown.[1]

Sir John Phear, however, is not quite so hostile to the claims of subjects to the seashore as against the Crown. In a very clear and concise passage he observes: "Almost all beneficial enjoyment of land is necessarily so exclusive in its character as to leave but little opening for question as to the possession; it is only with regard to waste lands, waters and the seashore, that any real doubt can arise. On the other hand, of these latter, the seashore especially is by its very nature so little capable of exclusive possession, that the most undoubted owner of it finds it very difficult to support his title by user. In some sense, ownership may be said to be the aggregate of exclusive

[1] Hall on the Seashore (2nd ed.), 17—108; Morris' Hist. of the Foreshore, 683-784.

easements; the greater the number of them which are openly exercised, the stronger is the probability of the greater right being the true foundation of that exercise; where, as in the case of the seashore, the incidents of enjoyment are very few, it is not easy to say whether the user of one or two of them is to be referred to ownership or to the lesser right. No general rules of guidance can be laid down, but perhaps it may be assumed that to make acts evidence of ownership, they must appear under the circumstances which surround them, to have been done animo habendi, possidendi, et appropriandi."[1]

In deciding claims to the foreshore by prescription and user, it is necessary to bear in mind a distinction generally recognised, and one founded on obvious reasons, that where the foreshore is claimed by a landowner as forming parcel of his land, the question is, so to speak, one of *boundary*; but that where it is claimed in gross, *i. e.*, not as forming parcel of any adjoining land, it is one of *title*. Acts of enjoyment exercised on the foreshore, which are more or less in the nature of mere franchises or liberties or profits à prendre or easements, are less readily construed as evidence of actual ownership of the soil, where the claim to the foreshore is in gross, than where the foreshore is claimed as forming parcel of the adjoining land. Of course, the presumption of ownership of the foreshore arising from the aggregate of these several acts, is in both cases in proportion as they are numerous, extensive and unequivocal. But in the latter case a lesser number of acts would suffice to raise a certain degree of presumption of ownership, than would be necessary to raise the same degree of presumption in the former; because, in that case, these acts, except such as are purely in the nature of franchises, liberties or privileges, are sooner regarded as having been done animo habendi, possidendi et appropriandi, than they are done in this.[2]

Claims to the foreshore by a subject are in England almost invari-

[1] Rights of Water, 88. Mr. Morris practically agrees with Sir John Phear, and dissents from the view put forward by Mr. Hall. He justly remarks that because the Crown only grants a limited and qualified ownership to the subject in the foreshore, the latter cannot from the necessity of the case be expected to shew more than a limited and qualified user of the subject-matter of his grant. Moreover, he adds that the Crown itself could not have had exclusive physical possession of the foreshore by embankment and enclosure thereof. How can it, therefore, require such impossible occupation from its grantee? Hist. of the Foreshore, 702 note (o).

[2] Messrs. Coulson and Forbes remark that there is no reported case in England where a claim to the foreshore in gross has been advanced merely on the basis of prescription and user. Law of Waters, 17.

ably made by lords of seaside manors, and as forming parcel of their manors.[1]

Discussion of English and Scotch cases.—In England in *Attorney-General* v. *James*,[2] *Calmady* v. *Rowe*,[3] *The Duke of Beaufort* v. *Swansea*,[4] and *Chad* v. *Tilsed*,[5] where claims to the foreshore were made by lords of adjacent manors, the evidentiary value of the several acts of enjoyment I have enumerated above, in raising a presumption whether the foreshore formed parcel of the manor or not, was discussed. It is needless to go into them in detail.

In *Attorney-General* v. *James*,[6] the defendant gave in evidence a grant of a manor, with fishery, wrecks of the sea, &c., and also gave in evidence various acts of ownership, such as taking sand and gravel, and preventing others from doing so. The learned Judge told the jury that the grant of the manor did not pass the shore, and left it to them to say whether they were satisfied by the evidence of user that the defendant had acquired a title as against the Crown; but the Court of Exchequer held that this was a misdirection, and that the proper question for the jury was, whether the evidence of user coupled with the grant satisfied them that the defendant had such title.

In Scotland, however, it would seem from the remarks of Lord Fitzgerald,[7] that less amount of proof than what would be necessary in England, would suffice to sustain a claim to the foreshore by an adjacent landowner on the ground of prescription. *Lord Advocate* v. *Lord Blantyre*,[8] and *Lord Advocate* v. *Young*,[9] decided by the House of Lords contain the latest exposition of the law of Scotland on this topic.

In *Lord Advocate* v. *Lord Blantyre*, the claim to the foreshore of a tidal navigable river (and the foreshore of the sea stands on precisely the same footing as the foreshore of a tidal navigable river, so far as regards the question we are now discussing) ex adverso the lands of the pursuers

1 Hall on the Seashore (2nd ed.), 17; Morris' Hist of the Foreshore, 683; Coulson and Forbes' Law of Waters, 18.

2 2 H. & C., 347; 33 L. J. Ex., 249.

3 6 C. B., 861.

4 3 Ex., 413; see also *Le Strange*, v. *Rowe*, 4 F. & F., 1048.

5 5 Moore, 185; 2 Brod. & Bing., 403.

6 *Supra*.

7 *Lord Advocate* v. *Young*, 12 App. Cas., 544.

8 4 App. Cas., 770.

9 12 App. Ca., 544.

(*i. e*, plaintiffs) held on barony titles, was rested on the grounds, first, that the barony titles, (which contained neither any express grant of the foreshore nor any specific boundaries which could be held to include the foreshore) alone gave them a title to it; and secondly, that at any rate the acts of possession enjoyed from time immemorial, coupled with the barony titles, conferred such a title. The acts of possession, proved to have been exercised during a period of forty years, were the pasturing of cattle regularly on the seagreens, cutting reeds and seaweeds, carrying off drift seaweed, carrying away large quantities of sand and stones, and depositing upon the foreshore great quantities of sand and soil dredged from the bed of the river and thereby elevating the surface above the level of high water. The House of Lords held that such acts of possession following on barony titles were sufficient to constitute a right of property in the foreshore, and that it was not necessary to decide the other ground.

Lord Blackburn, in delivering his opinion to the House in that case, thus observed with regard to the weight of each act of possession as evidence:—"Every act shown to have been done on any part of that tract by the barons or their agents which was not lawful unless the barons were owners of that spot on which it was done, is evidence that they were in possession as owners of that spot on which it was done. No one such act is conclusive, and the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, whether the act was such and so done that those who were interested in disputing the ownership would be aware of it. And all that tends to prove possession as owners of parts of the tract, tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole,[1] the weight depending on the nature of the tract, what kind of possession could be had of it, and what the kind of possession was. This is what is very clearly explained by Lord Wensleydale (then Baron Parke) in *Jones* v. *Williams*.[2] And as the weight of evidence depends on rules of common sense, I apprehend, that this is as much the law in a Scotch as in an English Court. And the weight of the aggregate of many such pieces of evidence taken together is very much greater than the sum of the weight of each such piece of evidence taken separately."[3]

[1] See upon this point Mr. Justice Bayley's observations in *Stanley* v. *White*, 14 East, 332.
[2] 2 M. & W., 326, at p. 331.
[3] 4 App. Ca., (770), 791.

Lord Advocate v. *Young*[1] is a stronger case. By sec. 34 (37 & 38 Vict. c. 94) of the Conveyancing (Scotland) Act, 1874, the period of prescription having been reduced from forty years to twenty years, the various acts of possession proved to have been exercised during a period of twenty years, were that the pursuer's (*i. e.*, plaintiff's) predecessors had built a retaining wall upon a portion of the foreshore, that he and his predecessors had taken stone and sand from the foreshore, and that they and their tenants had exclusively carted away the drift sea-ware. The Crown, on the other hand, adduced evidence to show that stones and sand had been taken from the shore to build a harbour, and that the villagers had carried away in creels drift sea-ware. The House of Lords held that the pursuer had given sufficient prescriptive evidence following on his title to confer on him a valid right of property to the solum of the foreshore as against the Crown.

Restrictions upon the proprietary title of the Crown or of its grantee.—Having discussed so far the nature of evidence required to establish the proprietary right of the subject to the foreshore as against the Crown, I next propose to consider the nature of some of the restrictions with which this proprietary right is burdened, whether it still remains in the Crown or has been granted to a subject.

1 **Right of access.**—First: The Crown's ownership of the soil of the foreshore is subject to the right of access to sea, possessed by the owner of the land adjoining the foreshore. The Crown cannot grant the foreshore to a subject free from this burden. It has been held in a very recent case[2] decided by the Privy Council that as against the Crown or its grantee such owner has a private right of access to and egress from the sea, distinct from his public right to the fishery and navigation thereover; and where there is an invasion of such right by means of reclamation and other works (*e. g.*, the erection of a quay or a pier) executed on the foreshore in front of his land by the Crown or its grantee, such owner is entitled to recover damages.[3] Besides the owner of the land adjoining the foreshore, every member of the public has a right of

[1] 12 App. Cas., 544.

[2] *Attorney-General of the Straits Settlement* v. *Wemyss*, 13 App. Cas., 192 Cf. *Lyon* v. *Fishmongers' Company*, 1 App. Cas , 662 ; *North Shore Railway Co* v. *Pion*, 14 App. Cas., 612.

[3] In England the dignity and prerogative of the Crown does not allow a petition of right for a tort committed by itself, but according to the law of the Straits Settlement (whence this appeal was brought before the Privy Council), the Crown can be sued in tort. *Attorney-General of the Straits Settlements* v. *Wemyss*, 13 App. Cas. 192.

access to the sea, for the purposes of navigation and fishing, though he may only get to the foreshore by means of a public highway.[1]

2. **Right of navigation.**—Secondly: This ownership of the Crown is also, as I mentioned before, subservient to the public right of navigation, and cannot be used in any way so as to derogate from, or interfere with, such right. The grantees of the Crown, consequently, take subject to this right, and any grant to a subject which interferes with the exercise of this public right is void as to such parts as are open to such objections, if acted upon so as to work an injury to the public right.[2] Any such interference with the public right will be abated as a nuisance. In the case of *Attorney-General* v. *Richards*,[3] it appeared that the defendants had built certain permanent structures in the Portsmouth harbour between high and low water-marks, which prevented vessels from passing over the spot or mooring there, and also endangered the navigation of the harbour by preventing the current of water from carrying off the mud. The structures were held to be nuisances, and defendants were restrained from making further erections, and were ordered to abate those already built. Every structure erected on the foreshore, however, is not necessarily a public nuisance. It becomes a public nuisance only when it interferes with the exercise of this public right. What is a public nuisance is therefore a question of fact to be decided according to the circumstances of each case.[4]

If an act be done for a public purpose and be productive of a counterbalancing advantage to the public in the exercise of that very right, the invasion of which constitutes the supposed nuisance, it is really within the trust, so to speak, of the Crown, and not wrongful.[5]

Although, neither the Crown nor its grantee is competent to obstruct the navigation, there can be no doubt that an obstruction authorized by Parliament would be lawful.[6]

The public right of navigation carries with it certain incidental pri-

[1] Hall on the Seashore (2nd ed.,) 172; Morris' Hist. of the Foreshore, 847-848.

[2] *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C., 192; *Attorney-General* v. *Burridge*, 10 Price, 350; *Attorney-General* v. *Parmeter*, 10 Price (378), 412.

[3] 2 Anst., 603.

[4] *Attorney-General* v. *Richards*, 2 Anst., (603), 615; *Attorney-General* v. *Burridge*, 10 Price, 350; *Reg.* v. *Betts*, 16 Q. B., 1022; *Reg.* v. *Randall*, 2 Car. & M., 496; *Attorney-General* v. *Terry*, L. R., 9 Ch., App., 423.

[5] *Rogers* v. *Brenton*, 10 Q. B., 26.

[6] *Rex* v. *Montague*, 6 D. & R., 616; 4 B. & C., 598.

vileges, such as the right to anchor, which involves the use of the soil beneath the water as well as of the water itself. The right of anchorage is essential to the full enjoyment of the right of navigation, and if reasonably and properly exercised, is protected like the principal right, even though it may cause a temporary disturbance of the soil, or an unavoidable injury to an oyster bed there planted.[1] Although this right of passage over water may be unlimited as regards locality,[2] yet it would seem that the right to anchor is confined to such places alone as are usual and reasonable having regard to the condition of the particular place.[3]

In *Mayor of Colchester* v. *Brooke*,[4] it was held that the right of passage in a river, and a fortiori in the sea,[5] exists at all times and states of the tide, and that it is no excess of this right if a vessel which cannot reach its destination in a single tide, remains aground till the tide serves again.

This right of passage was held in *Blundell* v. *Catterall*,[6] (a somewhat old case), not to extend, in the absence of necessity or of prescription, to the right of crossing the foreshore when it is dry at low-water for the purpose of bathing, fishing, landing goods, or of navigation, where the foreshore is vested in a private individual. In a supplemental chapter[7] of his essay on the seashore, Mr. Hall has elaborately and very forcibly combated the reasons for the judgment pronounced in that case and has adduced most excellent arguments to shew that the grounds, upon which the general right of the public to cross the seashore for the purpose of bathing was denied in that case, cannot reasonably be sustained. It may, perhaps, be worth while to observe, in further support of Mr. Hall's position, that as the owner of the foreshore in that case had the exclusive right of fishing thereover with stake nets under a valid grant created by the Crown before Magna Charta, the ultimate determination at which the Court arrived might well perhaps be upheld without acknowledging the necessity of affirming the very broad proposition, that the public has no right to cross the shore at low-water mark at any place; because the

1 *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C., 192; *Mayor of Colchester* v. *Brooke*, 7 Q. B., 339.

2 *Rex* v. *Ward*, 4 A. & E., 384.

3 *Williams* v. *Wilcox*, 8 A. & E., 314.

4 7 Q. B., 373.

5 *Blundell* v. *Catteral*, 5 B. & Ald, 268.

6 *Ibid.*

7 (2nd ed.), 155—186; Morris' Hist. of the Foreshore, 833—860.

unrestrained liberty of the general public to pass and repass over the foreshore is really incompatible with the exclusive right of a private owner to fish over any particular spot with what are called stake nets planted in the soil. Moreover, the grounds of decision in that case seem to be inconsistent with the judgment in *Bagot* v. *Orr*[1] where it was held that, the public has a right by Common law to take shell-fish from the shore, such as lobsters, crabs, prawns, shrimps, oysters &c. even though the proprietary right to the particular spot may be in a private individual. If a man is not a trespasser when he is up to his knees or neck in water in search of a lobster, a crab or a shrimp, it would indeed be a strange anomaly, if he were to be treated as such when he goes there for bathing. In fact, later decisions[2] seem virtually to have overruled the dicta in *Blundell* v. *Catterall*,[3] and it is doubtful whether they would be supported at the present day. If the proprietary right of the Crown or of its grantee were, subject to the public rights of navigation and fishing, so exclusive and absolute in its character, as it was declared to be by the learned Judges (except Best, J.,[4]) in that case, it would follow that even the owner of the land adjoining the foreshore would have no right of access to, and egress from, the sea over the foreshore where it happened to be vested in a subject (other than himself) by a grant from the Crown; but this, however, would, as I have already pointed out, be contrary to the rule of law established by the highest authority.[5]

With regard to the public right of way along the coast at high water for the purpose of navigation or fishing, Mr. Hall thus argues:— "The law, for instance, will compel him" *i. e.*, the fisherman or the navigator "to take the usual and public road down to the sea-side, if there be one within reasonable and convenient distance; but when there, how is he to reach his boat which may be a mile off along the shore, at the time of high water, unless he can go along the edge of the coast on the terrâ firma to his boat? It would be a serious obstruction to the fishery if he must bring his boat where the old road runs into the sea, and nowhere else. So, when in the sea, if he desire to land his fish, his mer-

[1] 2 Bos. & Pul., 472.

[2] *Marshall* v. *Ulleswater* Co. L. R., 7 Q. B., 166; *Mayor of Colchester* v. *Brooke*, 7 Q. B., 339.

[3] 5 B. & Ald. 268.

[4] Afterwards, Lord Wynford.

[5] *Attorney-General of the Straits Settlement* v. *Wemyss*, 13 App. Cas., 192. Cf. *Lyon* v. *Fishmongers' Company*, 1 App. Cas., 662; *North Shore Railway Co.* v. *Pion*, 14 App. Cas., 612.

chandise (not customable) or himself, at the time of high water, unless he is allowed a way along the terrâ firma to the next public road, he cannot land at all; wherefore in all such cases, at the time of high water, there must be a Common law right of way, along the dry land to the nearest inland road."[1]

3. **Right of fishery.**—Thirdly: The ownership of the foreshore by the Crown is also burdened with the public right of fishing thereover.[2] The Crown cannot since Magna Charta grant to a subject an exclusive right of fishery over the foreshore, nor grant any portion of the foreshore itself freed from this public right. An exclusive right of fishery in the sea or over the foreshore can now be claimed by a subject only under express grant from the Crown made prior to Magna Charta or by prescription, or ancient enjoyment presupposing such a grant.[3] This right of the public to fish has been held to include the taking of shell-fish, but not perhaps of shells.[4] This public right is, however, subservient to the paramount right of navigation.[5] Whether the fishermen and others have a right to drag up their vessels above the reach of the tides, upon the banks, for security and for repairs, as is the general practice, does not seem ever to have been decided; but this seems essential to the exercise of the right of fishing, and would therefore be supported. It is incontestable that immemorial custom will entitle the fishermen of a sea village to beach their boats in winter on ground adjoining the foreshore.[6]

There is no general right in the public to enter the foreshore and take sand, shells and sea-weed.[7] These being either part or natural products of the soil of the foreshore, belong primâ facie to the Crown or its grantees. When the soil of the foreshore still remains vested in the Crown, the removal of these things by the public is attributable rather to forbearance or non-intervention on the part of the Crown, than to the existence of any right in them.[8] A lord of a manor cannot claim a

[1] Hall on the Seashore (2nd ed.,) 176-177; Morris' Hist. of the Foreshore, 851-852.

[2] *Fitzwalter's case*, 1 Mod, 105; *Warren* v. *Mathews*, 1 Salk., 357; *Smith* v. *Kemp*, 2 Salk., 637; *Ward* v. *Cresswell*, Willes, 265; *Bagot* v. *Orr*, 2 Bos. & Pul., 472; *Carter* v. *Murcot*, 4 Burr., 2163; *Neill* v. *Duke of Devonshire*, 8 App. Cas., 135.

[3] *Malcolmson* v. *O'Dea*, 10 H. L. C., 593; *Neill* v. *Duke of Devonshire*, 8 App. Cas., 135.

[4] *Bagot* v. *Orr*, 2 Bos. & Pul., 472.

[5] *Attorney-General* v. *Parmeter*, 10 Price., 378; *Attorney-General* v. *Johnson*, 2 Wils., 87.

[6] *Aiton* v. *Stephen*, 1 App. Cas., 456.

[7] *Hewe* v. *Stowell*, 1 Al. & Nap., 356; *Bagot* v. *Orr*, 2 Bos. & Pul., 472.

[8] Per Best, J., in *Dickens* v. *Shaw*, Hall on the Seashore, (2nd ed.,) Apdx., lxviii.

right to cut sea-weed below low-water mark except by grant from the Crown or by prescription.[1] When, however, the sea-weed is thrown over the land of the adjacent owner by extraordinary tides,[2] or when the sand is drifted by wind over his land, it becomes the property of such owner.[3]

Neither the inhabitants of a town, which is not incorporated, nor the general public can claim a right by custom or prescription to take sand, shingle, or cut sea-weed from the foreshore, because such an unlimited enjoyment as the claim imports, might not only soon exhaust but be altogether destructive of the subject-matter of the claim.[4] The reasons for the opinions delivered in *Goodman* v. *The Mayor of Saltash*[5] decided lately by the House of Lords, would, however, go to to shew that a limited claim by the inhabitants of a borough, even though not incorporated, to take such sea-ware would be valid according to law.

The Roman law regarding wreck.—The Civil law with regard to wrecks is thus laid down by Justinian. "It is otherwise with things which are thrown overboard during a storm, in order to lighten the ship; in the ownership of these things there is no change, because the reason for which they are thrown overboard is obviously not that the owner does not care to own them any longer, but that he and the ship besides may be more likely to escape the perils of the sea. Consequently any one who carries them off after they are washed on shore or who picks them up at sea and keeps them, intending to make a profit thereby, commits a theft; for such things seem to be in much the same position as those which fall out of a carriage in motion unknown to their owners."[6]

[1] *Benest* v. *Pipon*, 1 Knapp., 60.

[2] *Lowe* v. *Govett*, 3 B. & Ad., 863; *Baird* v. *Fortune*, 7 Jur. N. S., 926, per Lord Campbell, C. J.

[3] *Blewitt* v. *Tregonning*, 3 A. & E., 554.

[4] *Race* v. *Ward*, 4 E. & B., 702; *Constable* v. *Nicholson*, 14 C. B. N. S., 230; 32 L. J. C. P., 240; *Blewitt* v. *Tregonning*, 3 A. & E., 554; *Padwick* v. *Knight*, 7 Ex., 854; *Attorney-General* v. *Mathias*, 4 K. & J., 579; *Lord Rivers* v. *Adams*, 3 Ex. D., 361.

[5] 5 C. P. D., 431; 7 Q. B. D., 106; 7 App. Cas, 633.

[6] 2 Moyle, Imp. Iust. Inst. 46. Alia causa est earum rerum, quae in tempestate maris levandae navis causa eiciuntur. hae enim dominorum permanent, quia palam est eas non eo animo eici, quo quis eas habere non vult, sed quo magis cum ipsa nave periculum maris effugiat: qua de causa si quis eas fluctibus expulsas vel etiam in ipso mari nactus lucrandi animo abstulerit, furtum committit. nec longe discedere videntur ab his, quae de rheda currente non intellegentibus dominis cadunt. Inst. ii. 1. 48. Cf. Dig. xli. 1. 9. 8. See J. Voet, Comm. ad Pand. lib. xli. t. 1. § 9.

Thus, according to the Civil law, wreck in general, whether taken while floating on the sea, or when cast on the shore, belonged to the first finder, unless the real owner claimed them, in which case they had to be restored to him, but no time apparently was specified within which the real owner was to assert his claim.

English law regarding wreck.—But such is not the law of England or of this country either. According to English law, all wrecks primâ facie belong to the Crown by virtue of the royal prerogative.[1] The reason for this, as stated by Lord Coke, is founded upon the two main maxims of the Common law: first, that the property in all goods whatsoever must be in some person; secondly, that such goods, as no subject can claim any property in, belong to the king by his prerogative as treasure trove, strays and others.[2]

The origin of this branch of the prerogative is now somewhat obscure. It has been said by some that the king, in ancient times was obliged at heavy expenses to occasionally scour the seas of robbers and pirates who committed depredations on the ships, and that all wrecks were assigned to him to meet these expenses.[3]

Different species of wrecks.—Wreck, in its generic sense, may be defined as goods floating on the sea or stranded below high-water mark, which have ceased, either actually or constructively to be in the possession of their owner.[4] It consists of four species:—(1) wreck property so called, flotsam, jetsam and ligan.

1. *Wreck,* property so called, refers to those goods which are cast or left on the shore. Wreccum maris significat illa bona quae naufragio ad terram appelluntur.[5]

2. *Flotsam* refers to goods floating on the sea, after a ship or vessel has sunk or otherwise perished.[6]

Si quis merces ex navo jactatas invenisset, num ideo usu capere non possit, quia non viderentur derelictae, quaeritur? Sed verius est eum pro derelicto usucapere non posse. Dig. xli. 7. 7. (Marcian).

[1] 2 Inst., 167; *Sir Henry Constable's case,* 5 Rep., 106; 6 Mod., 149. Anon.; Hall on Seashore (2nd ed.,) 44; *Sutton* v. *Buck,* 2 Taunt., 355; Woolrych on Waters, (2nd ed.) 14; Hale, de Iure Maris, p. 1. c. 7; Hargrave's Law Tracts, 37-39.

[2] 2 Inst., 167; Schultes' Aquatic Rights, 130; Woolrych on Waters (2nd ed.), 14.

[3] 2 Inst., 168; *Sir H. Constable's case,* 5 Rep. 106; Hale, de Iure Maris, p. 1. c. 7; Hargrave's Law Tracts, 41—42; Woolrych on Waters, (2nd ed.), 14.

[4] Phear on Rights of Water, 99 (note).

[5] *Sir Henry Constable's case,* 6 Rep., 106; 2 Inst., 166.

[6] *Sir Henry Constable's case,* 5 Rep., 106. "Flotsam is when the ship is split and the

3. *Jetsam* refers to goods cast into the sea and abandoned for the purpose of lightening the ship when it is in danger of being sunk, and afterwards the ship perishes.[1]

4. *Lagan* or *Ligan* (from ligo to tie) refers to heavy goods cast into the sea for the purpose of lightening the ship (which, nevertheless, afterwards perishes) with a buoy or float attached to them for the purpose of assisting in their future recovery.[2]

The first is denominated wreccum maris, and the rest adventurae maris.

Thus when flotsam, jetsam, or ligan are cast on the shore by the sea they are all called wreck.

The right of the Crown to wreck is distinct from, and independent of, the ownership of the shore, and the right to wreck on the shore may be granted to a subject apart from the shore itself.[3]

Wreck property so-called, frequently exists as a franchise attached to sea-coast manors. It may be claimed by a subject not only by grant but also by prescription.[4]

Right of wreck does not imply right to foreshore, nor vice versa.—A grant of the shore alone does not pass the right of wreck, nor does the grant of wreck alone pass the right to the shore, though it may be called in as evidence in support of a claim to the shore.[5] Lord Hale laid down that the perception of wreck furnishes a very strong proof of the existence of a right to the shore, but this rule has not been adopted in modern cases. Where the right to wreck is granted to a subject apart from the shore itself, which remains either in the Crown, or is granted to another subject, the grantee of the wreck has the right to cross the shore for the purpose of taking it.[6]

Conditions which wrecks must fulfil.—But all goods cast on the shore are not deemed wrecks so as to become the property of the Crown or of its grantee. They must fulfil these conditions :[7]—

goods float upon the water between high and low-water marks." Schultes' Aquatic Rights, 131. This seems, however, to be at variance with the description given in *Sir H. Constable's case*

[1] *Ibid.* [2] *Ibid.*

[3] 2 Inst., 168 ; *Sir H. Constable's case*, 5 Rep., 106 ; Hale, de Iure Maris, p. 1. c. 7 ; Hargrave's Law Tracts, 41-42 ; Woolrych on Waters (2nd ed.), 14.

[4] Hale, de Iure Maris, p. 1. c. 7 ; Hargrave's Law Tracts, 41 ; see *Talbot* v. *Lewis*, 6 C. & P. 603.

[5] *Dickens* v. *Shaw*; Hall on the Seashore (2nd ed.), Apdx., 45.

[6] *Alcock* v. *Cooke*, 2 M. & P., 625.

[7] Hale, de Iure Maris, p. 1. c. 7 ; Hargrave's Law Tracts, 34.

(1) The ship which carried these goods, or the goods themselves, must have wrecked or perished at sea. For, if the goods were taken by pirates and by some means or other they were brought ashore, they had to be restored to their true owner.

(2) That, even where the ship or goods had been wrecked and cast on the shore, no living thing should have escaped alive to land out of the ship, or any vestige remained by which the property might be identified, for otherwise such ship or goods, according to statute of Westminster, 1. c. 4, would not be deemed wreck.[1]

(3) That these goods had been cast on the shore or land and not brought thither in a ship or vessel.[2]

Procedure for seizure, custody and disposal of wrecks in England before 17 and 18 Vict. c. 104.—But all goods cast on the shore, whether they fulfilled these conditions or not, had to be saved and kept by the coroner, sheriff or king's bailiff, or by the Crown's grantee, and to be detained until the rightful owner claimed them and proved them to be his, in which case it had to be restored to him. The statute of Westminster 1. c. 4, following the Common law, allowed the rightful owner the period of a year and a day to make his claim, failing which the goods became the property of the Crown. The day and the year used to be reckoned from the time the goods were taken possession of.[3] Until the owner claimed them they remaind vested in the king for protection.

Flotsam, jetsam and ligan.—Flotsam, jetsam and ligan are within the jurisdiction of the Admiral and are called droits of the Admiralty.[4] If they are taken in the wide ocean, they belong to the taker of them, if the owner cannot be known.[5] But if they are taken within, what are called, the narrow seas, or in any haven, port or creek or arm of the sea, they primâ facie belong to the Crown, if the ship perishes and the owner cannot be known. But if the owner can be known, he gets them back.[6]

[1] *Sir H. Constable's case*, 5 Rep. 106, resol. 4.

[2] Woolrych on Waters, (2nd Ed.,) 13; 2 Inst., 167; *Sir H. Constable's case*, 5 Rep. 106. resol. 1.

[3] Hale, de Iure Maris, p. 1. c., 7; Hargrave's Law Tracts, 39; 2 Inst., 168; Woolrych on Waters (2nd ed.), 12; *Sir H. Constable's case*, 5 Rep. 106, resol. 4.

[4] *Sir H. Constable's case*, 5 Rep. 106, resol. 1, 2; 2 Inst. 167; Woolrych on Waters (2nd ed), 17; Hale, de Iure Maris p 1. c., 7; Hargrave's Law Tracts 41.

[5] *Sir H. Constable's case*, 5 Rep. 106, 108 (note); Hale, de Iure Maris, p. 1. c. 7; Hargrave's Law Tracts, 41; Woolrych on Waters (2nd ed.), 17. According to Bracton and Britton, they belonged to the finder, 5 Rep. 108 (note).

[6] Hale, de Iure Maris, p. 1. c. 7; Hargrave's Law Tracts, 41.

Lord Hale says that, a subject may also be entitled to these, as he may be to wreck, either by charter or by prescription.[1] A grantee of wreck alone cannot claim flotsam, jetsam or ligan. Even as to the right to the wreck, properly so called, a distinction is taken in the books. It may be seized on the shore between high and low-water marks either when the tide is in and the shore is covered with water, or when the tide is out and the shore actually dry. When the tide is in, the shore is within the jurisdiction of the Admiralty, and the wreck, a droit of the Admiralty; when the tide is out, the shore is within the jurisdiction of the Common law Courts, and the wreck is a wreccum maris and belongs to the lord of the manor, who has the franchise of wreck at the place.[2] The space between high and low-water mark is therefore regarded as divisum imperium, unless it be within the body of a county. This distinction is well illustrated by the case of *The Pauline*.[3] The vessel in that case was wrecked on the Pole sands, near the mouth of the Exe, and not within the body of any county. She was taken possession of while lying aground within low-water mark, but the tide had not then so far ebbed as to leave the place dry. In fact, the boat by means of which she was boarded, floated alongside her. The question raised was whether she was to be treated as wreccum maris, or as a droit of the Admiralty? If the former, she belonged to the lord of the manor; if the latter, to the Crown. Dr. Lushington held that it was a droit of the Admiralty and belonged to the Crown. In the course of his judgment, he said:—"I apprehend that the distinction, taken in all books, and not only with respect to civil rights, but also with respect to criminal jurisdiction, as the law stood before the statute, (4 and 5 Will. 4, c. 36, s. 22) immediately attaches, namely, that the jurisdiction of the Admiralty subsists at the time when the shore is covered with water; the jurisdiction of the Common law, and consequently, the rights of lords of manors, at the period when the land is left dry. The doctrine is thus laid down in East's Pleas of the Crown, under the title 'Piracy:'—'Upon the open seashore, it is past dispute, that the Common law and the Admiralty have alternate jurisdiction between high and low-water mark. But, in harbours or below the bridges in great rivers near the sea, which are

[1] Hale, de Iure Maris, p. 1. c. 7; Hargrave's Law Tracts, 42.

[2] *R.* v. *Two Casks of Tallow*, 2 Hagg. 294; *R.* v. *Forty-nine casks of Brandy*, 3 Hagg. 257; *The Pauline*, 2 Rob. Ad., 358; 9 Jur. 286.

[3] 2 Rob. Ad., 358, 9 Jur. 286.

partly enclosed by the land, the question is often, more a matter of fact than of law, and determinable by local evidence. There are, however, some general rules laid down upon this point, which it would be improper altogether to omit. It is plain, that the Admiralty can have no jurisdiction in any river, or arms or creeks of the sea within the bodies of counties, though within the flux and reflux of the tide.' "

Procedure for seizure, custody and disposal of wrecks in England under 17 and 18 Vict. 104—The rule founded upon this distinction naturally led to frequent scrambles between the officers of the Crown and the bailiffs or agents of lords of manors in the seizure of wrecks. To remedy this and various other inconveniences which arose therefrom, an improved procedure for the seizure, custody and disposal of wrecks has been laid down in the Merchant Shipping Act, 17 and 18 Vict. c. 104. Section 439 of the Act has, since 1st May 1855, vested the superintendence of all wrecks in the Board of Trade, who are thereby authorised to appoint persons, called receivers of wreck, to take charge of all wrecks in any district, the term wreck, by s. 2 of the statute, being made to include jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water.

The Admiral, Vice-Admiral, lords of manors and all other persons claiming the ownership of, or any other interest in, the wrecks are prohibited by s. 440 from interfering with them in any way. But the receiver is directed to deliver the wreck to the Admiral, Vice-Admiral, lord of manor or any other person, provided the latter prefers a claim within one year from the date when such wreck comes into his (*i. e.* the receiver's) possession, and pays all salvage expenses. By sec. 474 the Board of Trade has been authorised to purchase on behalf of the Crown the right to wreck belonging to any private individual. Unclaimed wrecks are, by s. 475, directed to be sold, and the proceeds to be made part of the Consolidated Fund of the United Kingdom.[1]

Procedure for seizure, custody and disposal of wrecks in India.—In India the law regarding wrecks is now regulated by ss. 71-79 of the Indian Merchant Shipping Act 1880, (VII of 1889), which sections are to some extent drawn on the lines of sections 459-475 of the English Merchant Shipping Act. By s. 71 wreck includes the following when found in the sea or any tidal water or on the shores thereof, that is to say—

[1] In England the law regarding wrecks is to some extent regulated by the following statutes:—17 and 18 Vict. c. 104, ss. 2, 418, 439-457, 471-475; 18 and 19 Vict. c. 91; ss. 19, 20; 25 and 26 Vict. c. 63, ss. 49-53; 43 and 44 Vict. c. 22 ss. 2, 7.

(*a*) goods which have been cast into the sea and then sink and remain under water.

(*b*) goods which have been cast or fall into the sea and remain floating on the surface.

(*c*) goods which are sunk in the sea, but are attached to a floating object in order that they may be found again.

(*d*) goods which are thrown away or abandoned, and a vessel abandoned without hope or intention of recovery,

In this country the right of the Government to wreck (in the senses above defined) in any particular area has not been parted with in favour of any private individual, either as appurtenant to any estate in land, or as an independent franchise[1]; it was not therefore at all necessary here to distinguish between goods cast on the shore and goods cast in the sea, or to classify the latter into flotsam, jetsam and ligan, a division which in England is called for by the Crown's grants of franchise of wreck and sometimes of flotsam, jetsam and ligan separately, to lords of manors or other persons. This Act therefore gives the denomination of wreck to all goods which have been cast or which fall into the sea or any tidal water, or on the shores of the sea or of any tidal water.

By s. 73, the local Government is authorised, with the previous sanction of the Governor-General in Council, to appoint persons to receive and take possession of wreck within certain prescribed local limits, such persons to be called receivers of wreck.

By s. 74, any person finding and taking possession of any wreck within any local limits for which a receiver of wreck has been appointed, is directed, if he be the owner thereof, to give the receiver notice in writing, of the finding of the wreck and of the marks by which it may be distinguished; and, if he be not the owner of it, to deliver it to the receiver.

The receiver on taking possession of any wreck is by s. 76 bound to publish a notification in such manner and at such place as may be prescribed by the Local Government, containing a description of it and the time at which, and the place where, it was found. If, after the publication of such notification, the wreck is either unclaimed, or the person claiming the same fails to pay the amount due for salvage, and for the charges in-

[1] But it has been held that the owner of a riparian estate may lay a claim as against Government to goods of an unknown person washed away by a river and floated on to his estate, as a right appurtenant thereto by grant from Government or by prescription. *Chuttur Lal Singh* v. *The Government*, 9 Suth., W. R. 97.

curred by the receiver, the latter is by s. 77 authorised to sell such wreck by public auction; if, of a perishable nature, forthwith; and if not of a perishable nature, at any period not less than six months after such notification.

The proceeds of the sale, after deduction of the amount due for salvage and for charges incurred by the receiver, together with the expenses of the sale, are to be paid to the owner of the wreck or if no such person appear, to be held in deposit for payment without any interest, to any person who may thereafter establish his right to it, provided he makes his claim within one year from the date of the sale. Sec. 79 provides certain penalties for failure to give notice of, or deliver, wreck to the receiver of wreck.

LECTURE III.

RIVERS GENERALLY: TIDAL AND NON-TIDAL RIVERS.

Popular definition of a river too vague for legal purposes—Defects of such a definition—Constituents of a river according to Roman law—Definition of alveus and ripa according to Roman law—Legal definition of a river—The component elements involved in this definition of a river—Bed and banks of a river, what—Landward and riverward boundaries of banks defined—Foreshore of a river, what—Current, a material ingredient of a river—Difficulties of ascertaining the point from which a river, in a legal sense, begins—Point from which a river begins in contemplation of law—Point at which a river terminates—Continual flow not essential to a river or stream—A tidal river, what—Its foreshore defined—The boundary line between the tidal and non-tidal portions of a river—Distinction between tidal and non-tidal rivers peculiar to the Common law of England—Ownership of the beds of tidal rivers—Ownership of the beds and banks of perennial rivers according to Bracton—Ownership of the beds of tidal rivers, according to Lord Hale—Reconciliation by Mr. Houck of the conflict between the respective doctrines of Bracton and Lord Hale—*The Royal Fishery of the Banne*—Opinions of text writers as to the true character of the Common law doctrine—How far this doctrine has been followed in America—Crown's primâ facie ownership of the beds of tidal rivers extends only as far as they are navigable—Dicta in *Malcolmson* v. *O' Dea*, *Gann* v. *Free Fishers of Whitstable*, *Lyon* v. *Fishmongers' Company*, *Neill* v. *Duke of Devonshire*, (as to the English law), and *Lord Advocate* v. *Hamilton*, and *Orr Ewing* v. *Colquhoun* (as to the Scotch law)—*Murphy* v. *Ryan*—*Hargreaves* v. *Diddams*—*Pearce* v. *Scotcher*—Public right of fishing co-extensive with the right of the Crown to the soil of a river—Tidality, merely primâ facie test of navigability—Foundation of the Crown's ownership of the beds of tidal navigable rivers—Foreshore and the beds of tidal navigable rivers primâ facie vested in the Crown—Alienation of the foreshore and the beds of tidal navigable rivers by the Crown forbidden by 1 Anne c. 7. s. 5.—Ownership of the beds and banks of non-tidal rivers—Extracts from Hale, de Iure Maris—Rules deducible from those passages—Rule of construction applicable to grants of land bounded by a non-tidal river—The principle upon which this rule is founded—Right of towage on the banks of navigable rivers, according to English law—Fishermen not entitled to use the bank for drying their nets.

Defects of the popular definition of a river.—A river has been defined by lexicographers as "a large stream of water flowing through a certain portion of the earth's surface and discharging itself into the sea, a lake, marsh, or other river."[1] A definition, such as this, is indeed too vague to be of any value in legal investigation. While, on the one hand, it mentions particulars which from a legal standpoint may be regarded as wholly immaterial, it omits on the other to set forth the most essential ingredients which are involved in the legal conception of a river. The law

[1] Ogilvie's Imp. Dict. "River."

regarding a stream of water issuing from an artificial fountain or a spring is fundamentally distinct from the law regarding a stream of water issuing from a natural source, and yet one may, without straining language, include the former kind of stream within this definition. A stream or a watercourse flowing through an artificial channel is regulated by entirely different legal principles from those which govern a stream flowing through a natural channel, and yet the definition is so vaguely worded as possibly to embrace even an artificial watercourse. Nor is the definition perhaps so precise in its terms as positively to exclude the case of water flowing not within certain defined banks or walls, but straggling or diffusing itself over a portion of the earth's surface, and finally escaping into a lake, marsh or a river, though even with regard to this, as we shall see hereafter, the legal rules are not the same as those which govern water flowing within defined banks or walls.

Constituents of a river according to Roman law.—Neither the Digest nor the Institutes of Justinian contain any definition of a river (flumen);[1] but a note in the Digest, probably by Gothofred, on the expression 'flumine publico' in the Interdict 'Ne quid in flumine publico &c,'[2] states that a river is constituted by three things, namely, alveus, aqua, and ripa,[3] that is, bed, water, and bank. The more correct expression, it is conceived, would be aqua profluens, instead of aqua simply, because as I shall shew presently, current is also an indispensable ingredient in the constitution of a river. Thus in the Roman Civil law the channel or hollow containing a river was distinguished as the bed and the bank, the river itself being water.[4]

Ripa or bank is defined by Ulpian as that (elevation of land) which contains the river, controlling the natural direction of its course.[5]

1 Voet in his commentary on title 12 of the 43rd book of the Digest, taking the definitions of the component elements of a river from the texts, defines it thus:—Flumen est collectio aquae intra certas ripas, flumen plenissimum continentes, cum naturalem cursus sui rigorem tenet, et incipientes ex quo primum terra à plano vergere incipit usque ad aquam.

2 Dig. xliii. 12. 1.

3 Tribus constant flumina, alveo, aqua et ripis.

4 Grotius, de Iur. Bell. et Pac. lib. ii. c. 8. § 9. Barbeyrac in a note (no. 2) upon this section states that, according to the received notions of the Roman lawyers the bed of a public river, considered in itself, is reckoned part of the banks; so that as soon as the river leaves its bed which thus ceases to be necessary for public use, the owners of the adjacent lands to whom the banks belong enter into possession of their own.

5 & 6 Ripa autem ita recte definietur id, quod flumen continet naturalem rigorem cursus sui tenens: ceterum si quando vel imbribus vel mari vel qua alia ratione ad tempus excrevit,

The reason for this last qualification, namely, that the bank merely controls the natural directions of the course of a river, is thus explained by him in the next passage:—But if at any time, either from rains, the sea, or any other cause, it (*i. e.*, the river) has overflowed for a time that (elevation of land), it does not (on account of such overflow) change its banks. Nobody has said that the Nile which by its overflow covers Egypt, changes or enlarges its banks; for when it has returned to its usual heights, the banks of its bed are to be secured.[6]

Paulus, however, gives a more precise definition of the bank of a river in the latter portion of the following placitum:—That is considered to be bank which contains the river when fullest. All the spaces next to the banks of rivers are not public, because to the bank is assigned the space from the line whence the slope from the plain (*i. e.*, the declivity) first commences down to the water.[1]

Vinnius, in commenting upon the first portion of this passage, says that, it follows from this that that space next to the bank which is sometimes not occupied by the river when diminished by heat in the summer season is not a part of the bank. But it is evident from the subsequent context (he continues) that the bank must not be taken to be that narrow space (of which there may be several) which corresponds either to the margin or brim of a river, or simply to the extremity of the bed and of the soil which contains the river, (and) of which extremity there can scarcely be any user; but that it is to be taken (to denote) that somewhat broader space which intervenes between the river and the adjacent land, so that the bank is considered to begin from that (line) where it slopes from the plain (and to extend) down to the river.[2]

ripas non mutat: nemo denique dixit Nilum, qui incremento suo Ægyptum operit, ripas suas mutare vel ampliare. nam cum ad perpetuam sui mensuram redierit, ripae alvei eius muniendae sunt. Dig. xliii. 12. 1. 5, (Ulpian).

Ne quis putet, si quando flumen imbribus vel nivibus auctum excreverit, ripas idcirco mutare. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De usu et proprietate riparum.

Bank is defined by Grotius thus:—Ripa est pars extima alvei, quod naturaliter flumen excurrit. De Iur. Bell. et Pac. lib. ii. c. 8. § 9.

[1] Ripa ea putatur esse, quae plenissimum flumen continet. Secundum ripas fluminum loca non omnia publica sunt, cum ripae cedant, ex quo primum a plano vergere incipit usque ad aquam. Dig. xliii. 12. 3. 1, 2.

[2] Ut significet, partem ripae non esse spatium illud ripae proximum, quod aliquando flumine caloribus minuto aestivo tempore non occupatur. Apparet autem ex sequentibus, ripam non tam anguste, ut nonnulli faciunt, accipiendam esse pro crepidine, aut labro amnis, sive pro sola extremitate alvei et terrae, quae flumen continet, cuius extremitatis vix

An obvious inference from this is that, according to Roman law the beach or foreshore of a river, that is, the space between high and low-water mark, is a part of the alveus or bed, and is generally subjacent to the river, being subject to the daily flow of the tide; whereas ripa or bank, which is also a part of the alveus, is generally not subjacent to the river, and it lies above the beach or foreshore,[1] where the river is tidal.

Legal definition of a river.—Lord Tenterden, in *Rex* v. *Inhabitants of Oxfordshire*,[2] interpreted the expression 'flumen vel cursus aquae', which occurs in the indictment upon the statute of Bridges 22 H. 8. c. 5.,[3] to mean water flowing in a channel between banks more or less defined.

"A stream of water," says Sir George Jessel, "is water which runs in a defined course, so as to be capable of diversion; and it has been held that the term does not include the percolation of water underground."[4]

Woolrych defines a river as a running stream pent in on either side with walls and banks, and it bears that name as well where the waters flow and reflow as where they have their current one way.[5]

A river, for legal purposes, may more fully be defined as a running stream of water arising at its source by the operation of natural law,[6] and by the same law pursuing over the earth's surface a certain direction in a defined channel, being bounded on either side by banks, shores or walls until it discharges itself into the sea, a lake, or a marsh.[7]

This definition therefore includes all natural streams, however small, flowing over the surface of the earth through a natural channel, and having a definite or permanent course, and excludes artificial watercourses, however large, supplied from a natural or an artificial source, (*e. g.*,

est ut ullus fit usus: sed aliquanto laxius pro spatio inter flumen et vicina praedia interjecto, ut ripa incipere intelligatur, ex quo a plano ad flumen vergit. Vinnius, Comm. ad Inst., lib. ii. t. 1. text. De usu et proprietate riparum.

1 'Litus' applies to the shore of the sea, and ripa to the bank of a river; there does not appear to be any word in Latin which corresponds exactly to the foreshore of a river. Hanck on Navigable Rivers, 4 (note).

2 1 B. & Ad., 302.

3 2 Co. Inst., 701.

4 *Taylor* v. *St. Helens Co.*, 6 Ch. D., 264.

5 Woolrych on Waters (2nd ed.), 40; Callis on Sewers, 77; Hanck on Navigable rivers, 1.

6 *I. e.*, after having been collected from rains or issuing out of the veins of the earth. Vel ab imbribus collecta, vel e venis terrae scaturiens. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De aere &c.

7 Angell on Watercourses (7th ed.), § 2; Woolrych on Waters (2nd ed.), 40; Coulson and Forbes' Law of Waters, 51; Gould on Waters, § 41.

water constantly pumped out of a mine and flowing in a stream), all bodies of water either percolating through the strata of the earth in an uncertain course or flowing underground in a defined channel, as well as all stagnant collections of water, as lakes or ponds, and all surface drainage, even though it may ultimately find its way to, and feed, a stream. A subterranean stream flowing in a known and defined channel may indeed, in some respects, give rise to rights similar to those which exist in respect of streams flowing above ground,[1] but mere percolating water[2] or surface drainage, being incapable of diversion, can never form the subject of riparian rights.[3]

Definitions of the constituents of a river.—The definition, I have just stated, assumes that every river involves the following constituent elements: (1) the bed; (2) the water; (3) the banks or shores; and (4) current.

The bed is the space subjacent to the water which flows over it, and includes that which contains the water at its fullest when it does not overflow its banks. The bank is the side or border of the bed within which the river flows when in its fullest state naturally, that is to say, when not temporarily overflowed by extraordinary floods or rains. "The bank and the water," observes Cowen, J., "are correlative, you cannot own one without touching the other."[4] The banks form a part of the bed of the river, and does not include either lands beyond the banks which are covered in times of freshets or extraordinary floods, or swamps or low grounds which are liable to overflow but are reclaimable for agriculture or for pasture.

The landward boundary of the bank is the line from which its declivity first commences. In those systems of law in which the bank is subjected to certain rights or servitudes in favour of the public, the position of this boundary is of no small importance to the owners of adjoining lands. They have a right to see that the exercise of these privileges by the public is confined within the limits of the bank, and, except in certain cases, to sue as trespasses any transgressions of those limits.

[1] *Dickenson* v. *Grand Junction Canal Co.*, 7 Ex. (282), 300; 21 L J. Ex, 241; *Chasemore* v *Richards*, 7 H. L. C., (849), 374; 29 L J. Ex. 81; 5 Jur. (N. S.) 873. Cf. Lect. XI, *infra*.

[2] Ibid; *Reg.* v. *Metropolitan Board of Works*, 3 B. & S. 710; 32 L. J. Q. B, 105; *Ballacorkish Silver Lead and Copper Mining Co.* v. *Harrison*, L. R., 5 P. C., 49; 43 L. J., P. C., 19. Cf. Lect. XI, *infra*.

[3] *Acton* v. *Blundell*, 12 M. & W., 324; 13 L J. Ex., 289; *Rawstron* v. *Taylor*, 11 Ex., 369; 25 L. J. Ex., 33; *Broadbent* v. *Ramsbotham*, 11 Ex., 603; 25 L. J. Ex., 115. Cf. Lect. XI, *infra*.

[4] *Starr* v. *Child*, 20 Wend., (149), 152, cited in Gould on Waters, § 41, (note).

The position of the riverward boundary of the bank is also material under those systems where the bed of tideless navigable rivers is vested in the state, and their banks in the subject. Questions often do arise as to whether any structure erected on the bank is also an encroachment on the public domain.

The nature of the test which ought to be applied in determining this boundary line is so clearly discussed by Justice Curtis in a case in the Supreme Court of the United States that I cannot do better than quote a portion of his judgment:—"The banks of a river" says the learned Judge "are those elevations of land which confine the waters, when they rise out of the bed; and the bed is that soil so usually covered by water, as to be distinguishable from the banks by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor the middle stage of the water, can be assumed as the line dividing the bed from the bank. The line is to be found by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation as well as in respect to the nature of the soil itself. Whether this line, between the bed and the banks, will be found above or below, or at a middle stage of water, must depend on the character of the stream. The height of a stream, during much the larger part of the year, may be above or below a middle point between the highest and lowest flow. Something must depend also upon the rapidity of the stream, and other circumstances. But, in all cases, the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearance they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows, wherever the bank is not too steep to permit such growth, and the bed being soil of a different character, and having no vegetation, or only such as exist when commonly submerged in water."[1]

The foreshore[2] or beach of a river is ordinarily defined as that band

[1] *Howard* v. *Ingersoll*, 13 Howard, 426, cited in Houck on Navigable Rivers, 6-7; and in Angell on Watercourses, (7th ed.) §§ 2-3 (notes)

[2] The term 'shore' is strictly applicable with reference to the sea or a tidal river, but

or margin of the bed of a river which lies between the high and low-water marks. Like the foreshore of the sea, this band or margin also fluctuates, but it does so generally between the outermost limit of the bed and its lowest extremity when the water reaches its lowest level at neap tide.

Current is also a material ingredient of a river. Indeed, a stream necessarily involves the idea of a current. It is the presence of the current which gives rise to questions relating to the acceleration or retardation or obstruction of water, which do not arise in the case of still waters, like lakes or ponds. Current induced by artificial means, for example, by means of locks in a canal for the purposes of navigation, does not bring such canal within the category of a river, so as to make the doctrines relating to natural or artificial streams applicable to it. This is illustrated by the case of *Staffordshire Canal* v. *Birmingham Canal*,[1] where Lord Cranworth, in delivering his opinion to the House of Lords, said:—"The water passing from the Wolverhampton Level to the Atherley Junction, is not a natural, nor even an artificial, stream in the sense in which these words are understood in the many cases in which the law relating to flowing water has been considered. The water in this canal is not flowing water. It is water accumulated under the authority of the legislature in what is in fact only a tank or reservoir, which the respondents are bound to economise and use in a particular manner for the convenience of the public. It never flows. It is let down artificially, for the convenience of persons wishing to pass with boats, by what may be called steps, till it reaches the Atherley Level, and so enables the boats to pass into appellant's canal. To such waters none of the doctrines, either as to natural or artificial streams, is applicable."

It is necessary, however, to add that the existence of current alone does not distinguish a river from a lake. There are natural lakes in which there is current in the surface water flowing from a higher to a lower level, and discharging itself through a small outlet into a river or a marsh. But the presence of such current merely does not make that a river which would otherwise be a lake, nor does the fact that a river broadens like a pond-like sheet between any two points give it the legal incidents of a lake.[2]

it is sometimes also used with respect to a fresh river or a lake, either as synonymous with bank or as denoting that portion of the bank which touches the margin of the stream at low water.

[1] L. R., 1 H. L., 254. Cf. *Rochdale Canal* v. *Radcliffe*, 18 Q. B., 287.

[2] Cf. *Mackenzie* v. *Bankes*, 3 App Cas., 1321.

Point from which a river begins.—The definition of a river for legal purposes is not complete unless we know exactly the point from which it commences, and the point where it terminates. The determination of these points, essential as it is sometimes to the adjustment of the rights and liabilities of riparian proprietors, is generally, from the very nature of the thing attended with no small difficulty. Water issuing from the veins of the earth through a spring or falling from heaven on the surface of a hill, descends by the force of gravity into a rivulet or stream, which uniting oftentimes with similar streams in their onward course, ultimately feeds a river. Does the river or stream begin, and consequently do riparian rights come into existence, from the spring-head, from the top of the hill, from its foot, or from any other intermediate point on its surface? The spring may be situated wholly within the land of one person, or the hill may belong exclusively to a single individual. Has the owner of the land within which the spring is situated, a right to appropriate, or otherwise prevent flowing into the brook, all the waters issuing out of the spring, or has the owner of the hill a right to divert the water so as to prevent its falling into a particular stream at its foot? These are for the most part questions of some nicety, and their solution really depends upon a determination in each particular case of the point from which the river or stream may, in legal intendment, be said to begin.

"A river or stream," says Mr. Angell, borrowing the language used by Baron Martin, in the case of *Dudden* v. *The Guardians of Clutton Union*,[1] "begins at its source, when it comes to the surface." This statement of the law is true only when the channel of the stream commences, as in fact it did in that case, at the very source or spring-head;[2] for as Pollock, C. B., said on that occasion, "if there is a natural spring the waters of which flow in a natural channel, it cannot be lawfully diverted by any one to the injury of the riparian proprietors. The law of the case is clear and undoubted. This was a natural spring, the waters of which *had acquired a natural channel from its source to the river.* It is absurd to say that a man might take the water of such a stream, four feet from the surface." But the proposition as stated by Mr. Angell is not true where the water, after rising to the surface through a spring, diffuses itself or trickles away without any defined course over, and within the limits of, the land

[1] 11 Ex, 627; 23 L. J. Ex, 146. Cf. *Ennor* v. *Barwell*, 2 Giff, 410, 6 Jur, N. S. 1233; 7 Jur, N. S. 788, *Gaved* v. *Martyn*, 15 C. B., N. S., 732.

of the person in which the spring is situated, even though such water, if suffered to remain, may afterwards flow into a natural and defined stream either within or without the bounds of his property. For, in such a case, the law appears to be that the lower riparian proprietors have no right to the flow of water, and that the landowner is entitled to treat such water as a nuisance, as being prejudicial to cultivation, and to drain his land or get rid of the nuisance in any way he finds most convenient.[1]

This view of the law was recognised in a very recent case[2] which came before the Privy Council on appeal from the Supreme Court of the Cape of Good Hope, where one of the questions argued was, whether by the Roman-Dutch law which obtains in that Colony, the owner of the land in which a fountain arises and flows in a known and defined channel has the absolute right to dispose of the water in what way he pleases. Lord Blackburn in delivering the judgment of the Board, after quoting the following observation from the judgment of Sir James Colville in the case of *Van Breda* v. *Silberbauer*[3] :—"Again their Lordships have not before them the particular texts in Voet upon which all the judges seem to concur in holding that, if the streams do rise in the appellant's land, he is, by the law of the Colony, entitled to do what he pleases with their waters. Their Lordships are not satisfied that this proposition is true without qualification; or that by the Dutch-Roman law, *as by the law of England*, the rights of the lower proprietor would not attach upon water which had once flowed beyond the appellant's land in a known or definite channel, even though it had its source within that land"—said:—"This does not, as was truly said, amount to a decision, for the case was decided upon other grounds, but it does amount to an expression of a very grave doubt, whether that which was alleged to be the Dutch-Roman law could be so, the English law as laid down by Lord Kingsdown being so much more convenient. In this doubt, their Lordships in the present case participate." It was in *Miner* v. *Gilmour*,[4] that

[1] *Rawstron* v. *Taylor*, 11 Ex., 369; 25 L. J. Ex., 33; *Broadbent* v. *Ramsbotham*, 11 Ex., 603; 25 L. J., Ex. 115. In *Ennor* v. *Barwell*, 2 Giff., 410; 6 Jur., N. S., 1233, where in consequence of the close proximity of the spring to the boundary of the adjoining neighbour's property, the water rising from it could not deeply furrow, or make clear and defined, a channel before it reached such boundary, it was held that the owner of the land in which the spring was situated was not entitled to divert its water.

[2] *Commissioners of French Hoek* v. *Hugo*, 10 App. Cas., 336.

[3] L. R., 3 P. C., (88), 99.

[4] 12 Moo. P. C. C., 131.

Lord Kingsdown laid down the English law referred to here, and it was thus expressed:—"But he" (*i. e.*, the riparian proprietor) "has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury."

Again, the proposition is not true where rain-water collecting in a basin formed on a hill, overflows its brim and squanders itself on the adjoining surface, though it ultimately finds its way into a brook running at its foot; for in such case too the owner of the land in which the basin is formed has a right to drain the water from it. "No doubt," observed Baron Alderson, in *Broadbent* v. *Ramsbotham*,[1] "all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls, from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel."

It is by an examination of such 'frontier' instances, that the real foundation of most of the legal rights in this as in any other department of law, can be successfully discovered, and the true principle deducible from the examples I have cited, indeed seems to be that a river or a stream commences and riparian rights accrue from the point where the water begins to flow in a well-defined natural channel.[2] The correctness of this conclusion appears further to be corroborated by the analysis of the basis of riparian rights, for if such basis, as I shall hereafter shew, be the ownership of the banks of a stream, and if bank and channel are correlative and interdependent, no riparian rights can arise unless there exists a natural channel.

Point at which a river terminates.—A river terminates where it mingles with the sea, an arm of the sea, a lake or a marsh. It is not very material to determine for legal purposes, the precise point at which a river terminates, for the transition from a river to a sea, a lake or a marsh does not in general cause any difference in the nature of riparian or other rights. Wherever any such difference exists, it is the

[1] 11 Ex., 602; 25 L. J. Ex. 115.

[2] *The Grand Junction Canal Co.* v. *Shugar*, L. R., 6 Ch. App., 483.

creature of some special statute, and in such case, the statute itself fixes, for its own purposes, the boundary line between a river and the sea or a lake.

Intermittent stream.—It is not necessary, however, to constitute a river or a stream in a legal sense, so as to annex riparian rights thereto, that water should flow in it continually. A stream may be 'intermittent,' that is, be dried up at certain seasons of the year, and yet riparian rights will attach to its water as though the stream were continual. But the cause of the flow of water in the stream, whether it be at regular or even at irregular periods, must be of a permanent character, such as natural floods or rainfalls, which in the ordinary course of nature must from time to time recur, and not of a temporary nature, as the pumping of water from a mine.[1]

Ownership of the beds of rivers.—Having thus arrived at a somewhat accurate notion of the legal signification of a river, I shall now proceed to consider the ownership of its bed under different systems of law. A stream rising from a hill or a mountain, gradually expanding into a river as it flows down its course, and ultimately debouching itself into the sea, (to take that as a typical instance of rivers generally), is up to a certain point tidal, that is, affected by the flux and reflux of the sea, and beyond it, is non-tidal. The tidal portion is generally navigable; but the non-tidal portion may or may not be navigable. It may be navigable up to a certain point and beyond it, may be wholly non-navigable. There are, no doubt, rivers or rather small streams besides, which throughout their whole course are both non-tidal and non-navigable, or again, small creeks which are tidal and yet non-navigable.

For the purpose, therefore, of presenting to you in a clear and intelligent shape the discussion relating to the ownership of the beds of rivers, I shall consider such ownership :—

First, with reference to the tidal or non-tidal character of a river; and

Secondly, with reference to its navigable or non-navigable character.

Tidal rivers.—Before we proceed to discuss the main question, let us know exactly what is meant by a tidal river, the extent of its foreshore, and the boundary line between the tidal and non-tidal portions of a river.

A tidal river may generally be defined as a river, the waters of which daily rise and fall with the flux and reflux of the sea caused by the

[1] *Drewett* v. *Sheard*, 7 C. & P., 465; *Trafford* v. *Rex*, 8 Bing. 204.

phenomenon known as the tides. It follows from this definition that a river which discharges its waters into a lake or a marsh, unconnected with the sea, cannot be tidal.

The foreshore of a tidal river is a part of its bed, and its limits are ascertained upon the same principle and defined in the same way as those of the foreshore of the sea. Its high-water mark corresponds to the line reached by the average of the medium high tides between the springs and the neaps in each quarter of a lunar revolution throughout the year; and the low-water mark, to the line reached by the average of the medium low tides between the springs and the neaps in each quarter of a lunar revolution throughout the year.[1] It is important to know the precise extent of both the limits, because, although generally, as I shall shew later, the Crown in England, and the Government in India, is the owner of the foreshore of a tidal river up to high-water mark, yet a subject may claim a right to it by charter, grant or prescription, and in that case a determination of the low-water mark which defines the boundary line between the property of the Crown and its subject becomes most material.

Boundary line between the tidal and the non-tidal portions of a river.—The boundary line between the tidal and non-tidal portions of a river

[1] *Attorney-General* v. *Chambers*, 4 De G., M. & G. 206; 23 L. J. Eq. 662; 18 Jur. 779.

In India, the question regarding the precise line of high-water mark as separating the property of Government from that of a private landowner, has arisen in two cases with regard to some lands on the foreshore of the river Hooghly. In *Govindo Lall Seal and another* v. *The Secretary of State*, A. O. D. No. 32 of 1882 in the High Court of Calcutta, (the judgment whereof is unreported) the Lower Court had held that the boundary line corresponded with the level of average high water during the year, and that the height of the average tide level in the river Hooghly at Calcutta was 15·09 feet above the datum of Kidderpur Dock Sill. The High Court on appeal simply affirmed this judgment.

In *Joy Krishna Mookerjee and others* v. *The Secretary of State*, A. O. D. No. 445 of 1885, decided on the 6th July 1886, (also unreported), it was found that during four months in the year, when the river was in freshwater flood (as all tidal rivers in India are) the water on the foreshore at the spot in suit below the line indicating the average of the highest spring tides during that period marked against a vertical bank was breast-high and that during that period it was navigable not only for small boats carrying passengers or for fishing boats, but navigable for native boats of very considerable size, and that this line was only from eighteen inches to two feet above the 15 09 feet line laid down in the previous case. Norris and Macpherson, JJ., concurring with the lower Court, held that the boundary line was properly determined. Cf. *Secretary of State for India* v. *Kadirikutti*, I. L. R., 13 Mad. (369), 375, where the Court was of opinion that in the absence of local usage or statutory enactment, the rule laid down in *Attorney-General* v. *Chambers* ought to be followed in India.

has been held in the recent case of *Reece* v. *Miller*,[1] to depend not upon the presence or absence of salt water, but upon the fact whether there is fluctuation of water, as shown by its regular rise and fall, under the influence of the tide. Lord Hale says, "that is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows; so that the river Thames above Kingston and the river Severn above Tewksbury, &c., though there they are public rivers, yet are not arms of the sea. But it seems, that although the water be fresh at high water, yet the denomination of an arm of the sea continues, if it flow and reflow as in the Thames above the bridge."[2]

The question arose for judicial decision in England for the first time apparently in *Rex* v. *Smith*.[3] It was attempted to be argued there, that the right of the Crown to the soil of the Thames extended no further than London Bridge and that the sea did not properly flow beyond the bridge, although there was a regular rise and fall of the river caused by the accumulation and pressure backwards of the fresh water. Lord Mansfield held that the distinction between rivers navigable and not navigable, and those where the sea does or does not ebb and flow, was very ancient and that there were no new facts in the case, which let in the distinction contended for, between the case of the tide occasioned by the flux of the sea water and the pressure backwards of the fresh water.

The point up to which a tidal navigable river, and consequently the public right of fishery therein, extends, directly arose, however, in *Reece* v. *Miller*,[4] where it appeared that the water of the river Wye at the spot in question was not salt, and that in ordinary tides it was unaffected by any tidal influence, but that upon the occasion of very high tides, the rising of the salt water in the lower parts of the river dammed back the fresh water, and caused it upon those occasions to rise and fall with the flow and ebb of the tide. It was held that the right of the Crown and the public right of fishery did not extend to this part of the river. Grove, J.,

[1] 8 Q. B. D. 626. The Supreme Court of the United States referring to the case of *Rex* v. *Smith*, 2 Doug. 441, have decided, that although the current in the river Mississippi at New Orleans, may be so strong as not to be turned backwards by the tide, yet, if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it might properly be said to be within the ebb and flow of the tide. *Peyroux* v. *Howard*, 7 Pet. 324; *Attorney-General* v. *Woods*, 108 Mass. 439; *Lapish* v. *Bangor Bank*, 8 Maine, 85; cited in Angell on Watercourses (7th Ed.) § 544, note.

[2] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 12.

[3] 2 Doug., 441.

[4] 8 Q. B. D. 626.

said:—"The question what constitutes a tidal navigable river has been discussed in various cases, and in my judgment a river is not rendered tidal, for this purpose, at the place in question by the fact that it may be affected by the tide as described in this case on the occasion of unusually high tides, when the action of the tide is reinforced by a strong wind, or some such exceptional circumstance causes the tide to rise unusually high. In order that the river may be tidal at the spot in question, it may not be necessary that the water should be salt, but it seems to me that the spot must be one where the tide in the ordinary and regular course of things flows and reflows. There is no case which shews that because at exceptionally high tides some portion of the river is dammed up and prevented from flowing down and so rises and falls with the tide, that portion of the river can be called tidal."

Ownership of the beds of tidal navigable rivers under English law.—Now to proceed to the determination of the ownership of the bed of a tidal navigable river. It is necessary to premise that the division of the bed of a river according as its waters are within or beyond the influence of the ebb and flow of the tide is wholly peculiar to the Common law of England. It is unknown to most of the continental systems of law deriving their jurisprudence from the Civil law. Unlike the small rivers in England with their short courses[1] which in former times were, with trifling exceptions, only navigable in their natural condition as far as the ebb and flow of the tide for any purpose useful to commerce,[2] the streams on the continent are many of them large and long and navigable to a great extent above tide-water, and accordingly we find, as I shall have occasion to point out later, that the Civil law which regulates and governs those countries has adopted a very different rule.

Bracton, the earliest English authority on this question, borrowed the phraseology of the Institutes[3] in laying down the law. He said thus: "All rivers and ports are public, and accordingly the right of fishing

[1] "In England, or in Great Britian, the chief rivers are the Severn, Thames, Kent, Humber, and Mersey, the latter of which is about fifty and the first about three hundred miles in length; and of this (the Severn) about one hundred miles consists of the Bristol Channel. The world-renowed Thames has the diminutive proportions of two hundred miles and of even these lengths, not the whole is navigable," *per* Judge Woodward in *McManus v. Carmichael*, 3 Iowa, 1, cited in Houck on Navigable Rivers, 37.

[2] Woolrych says:—"Few of our rivers, besides the Thames and the Severn, were naturally navigable, but have been made so under different Acts of Parliament." 3 T. R., 255, by counsel, arg. Woolrych on Waters (2nd. ed.), 40 (note (d)).

[3] Inst. ii. 1. 1, 2, 5.

in a port and in rivers is common to all persons. The use of the banks is also public by the law of nations, as of the river itself. It is free to every person to moor ships there to the banks, to fasten ropes to the trees growing upon them, to land cargoes and other things upon them, just as to navigate the river itself; but the property of the banks is in those whose lands they adjoin; and for the same cause the trees growing upon them belong to the same persons; and this is to be understood of perennial rivers, because streams which are temporary may be property."[1] The close similarity of this language to the language of the Roman Civil law has induced some writers to affirm that Bracton simply stated the rule of the Roman Civil law upon the subject, and that he did not intend to lay down the rule according to the Common law. It has led others to theorize that in the thirteenth century the law upon this subject was in an undefined state, and that Bracton supplied the deficiency by borrowing from the Roman law. An intermediate position maintained is that at that early period the rules of the Civil law and the Common law upon this point were identical.[2] This last view, however, has ultimately prevailed in recent times,[3] and it may therefore be taken that anciently under the Common law, rivers and harbours were public, without reference to the tide.

But Lord Hale laid down that fresh rivers, of what kind soever, belonged to the owners of the soil adjacent, with the right of fishing therein, usque filum aquae, and that the king's right by prerogative was limited to such rivers as were arms of the sea, and that that was to be called an arm of the sea, where the sea flowed and reflowed, and so far only as the sea so flowed and reflowed.[4]

This conflict between the doctrines laid down by Bracton and Lord Hale respectively, is regarded by Mr. Houck as only apparent, and he has, in his excellent treatise on the Law of Navigable Rivers, attempt-

[1] Sir Travers Twiss' edition of Bracton, v. i. p. 57. "Publica vero sunt omnia flumina et portus. Ideoque ius piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est de iure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis reponere, cuivis liberum est, sicut per ipsum fluvium navigare. Sed proprietas earum est illorum quorum praediis adhaerent, et eadem de causâ arbores in eisdem natae eorundem sunt. Sed hoc intelligendum est de fluminibus perennibus, quia temporalia possunt esse privata." Bracton, lib. i. c. 12. fol. 7, 8; also quoted in Hale, de Portibus Maris, p. ii. c. 7; Hargrave's Law Tracts, 83-84.

[2] *Per* Best, J., in *Blundell* v. *Catterall*, 5 B & Ald., 268.

[3] 2 Reeve's Hist. of English Law (3rd ed.) 88, 282; Güterbock's Bracton, preface.

[4] Hale, de Iure Maris, p. 1, c. 4; Hargrave's Law Tracts, 12.

ed to reconcile it, by showing, as a historical fact that in Bracton's days transportation of goods on the fresh water by barges and lighters was unknown in England, that none other than salt-water rivers were navigable, or rather used for navigation, and that therefore when Bracton spoke of rivers and ports being public, he meant navigable rivers only, and their ports, though as a matter of fact, navigation was in those days confined to salt-water rivers only; that this accidental coincidence led Lord Hale, who deduced the law from the cases actually adjudicated and reported in the Year Books,—the facts of every one of which had occurred on salt-water,—to narrow down the doctrine of the Common law by restricting public navigable rivers to such rivers only as were subject to the ebb and flow of the tide.[1]

Turning to reported cases, after those in the Year Books and which are mentioned in the De Iure Maris, the earliest one we find is that of *The Royal Fishery of the River Banne*,[2] in Ireland, in which it was held that "there are two kinds of rivers, navigable and not navigable; *that every navigable river, so high as the sea ebbs and flows in it*, is a *royal* river, and belongs to the king by virtue of his prerogative; but in every other river, and in the fishery of such other river, the terre-tenants on each side have an interest of common right; the reason for which is, that so high as the sea ebbs and flows, it participates of the nature of the sea, and is said to be a branch of the sea so far as it flows."

The rule thus laid down was followed in a long, though perhaps not uniformly consistent, course of decisions, in England, notably amongst them being *Bulstrode* v. *Hall*,[3] *Fitzwalter's case*,[4] *Warren* v. *Mathews*,[5] *Rex* v. *Montague*,[6] *Carter* v. *Murcot*,[7] *Mayor of Lynn* v. *Turner*,[8] *Rex* v. *Smith*,[9] *Miles* v. *Rose*,[10] *Bagot* v. *Orr*,[11] *Ball* v. *Herbert*,[12] *Mayor of Colchester* v. *Brooke*[13] *and Williams* v. *Wilcox*.[14]

Some discussion has taken place in England, especially amongst text writers, as to the true doctrine of the Common law upon this topic as deducible from these cases. Serjeant Woolrych and Sir John

[1] Houck on Navigable Rivers, §§ 24-44.
[2] Sir John Davies, 149.
[3] 1 Sid., 149; see also Com. Dig. Navigation (A), (B).
[4] 1 Mod. 105; 3 Keb. 242.
[5] 6 Mod. 73; Salk. 357, approved by Willes, C. J., in Willes, R. 265-268.
[6] 4 B. & C., 598.
[7] 4 Burr. 2163.
[8] Cowp. 86.
[9] 2 Doug. 441.
[10] Taunt. 705.
[11] 2 Bos. & Pul. 472.
[12] 3 T. R. 253.
[13] 7 Q. B. 330.
[14] 8 Ad. & El. 314.

Phear have contended that navigability in fact is the real and unfailing test to apply to ascertain whether a river is public, the flow and reflow of the tide being merely prima facie, though strong, evidence that a river is navigable. After discussing *The Mayor of Lynn* v. *Turner*, *Rex* v. *Montague* and *Miles* v. *Rose*, Serjeant Woolrych thus concludes :—"Public user for the purposes of commerce is, consequently, the most convincing evidence of the existence of a navigable river, and that fact being established, the accompanying rights of fishery, and of ownership of soil, &c., are easily defined".[1] And Sir John Phear observes "it is too perhaps not free from doubt whether the land covered by non-tidal rivers, which are navigable, and by large fresh-water lakes, does not by Common law belong to the Crown."[2]

But the controversy in America, both among judges and text-writers, as to what is the true doctrine of the Common law has been of a more serious and practical character. While some states have implicitly adopted the strict Common law rule as laid down in the De Iure Maris, and others have accepted a modified view of it, namely, as furnishing a primâ facie test, a third class of states, has openly repudiated the Common law doctrine, and has followed the guidance of the Civil law upon this matter. I shall endeavour in the next lecture to give you a short account of the details of this controversy.

Whatever the views of text writers in England, and the course of decisions in the different states in America, a series of modern cases has at last finally settled the rule of law in England. The ownership of the soil of all navigable rivers, as far as the tide flows and reflows, and of all estuaries and arms of the sea, is according to that rule, vested primâ facie in the Crown. As in the case of the foreshore of the sea, it is so vested not for any beneficial interest in the Crown itself, but as a trustee for its subjects, collectively, and cannot be used in any way so as to derogate from, or interfere with, their rights of navigation and fishery, which are primâ facie common to all.

It is clear from the proposition thus stated, that the ownership of the Crown in England extends not to the soil of every navigable river, whether it be tidal or non-tidal, but is confined only to such rivers or such parts of rivers as are both navigable and tidal. Navigability and tidality must both concur in order that the right of the Crown and with it, the right of the public may attach to the soil of the bed of a river.

[1] Woolrych on Waters, (2nd ed.) 42.

[2] Phear on Rights of Water, 13.

Willes, J., in submitting the opinion of the Judges to the House of Lords in *Malcolmson* v. *O'Dea*,[1] said:—"The soil of all navigable rivers, like the Shannon, so far as the tide flows and reflows, is primâ facie in the Crown, and the right of fishing primâ facie in the public."

Lord Westbury addressing the House of Lords, in *Gann* v. *The Free Fishers of Whitstable*,[2] said:—"The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with, the right of navigation, which belongs by law to the subjects of the realm."

In *Lyon* v. *Fishmongers' Company*,[3] where the question was as to whether a riparian owner on the banks of a tidal navigable river had a right of access to the water, as a private right, distinct from his right, as a member of the public, Lord Selborne thus expressed himself:—"Upon principle, as well as upon those authorities, I am of opinion that private riparian rights may, and do, exist in a tidal navigable river. The most material differences between the stream above and the stream below the limit of the tides are, that in an estuary or arm of the sea there exist, by the Common law public rights in respect of navigation and otherwise, which do not generally (in this country) exist in the non-tidal parts of the stream; and that the *fundus* or bed of the non-tidal parts of the stream belongs, generally to the riparian proprietors, while in the estuary it belongs generally to the Crown."

Similarly in *Neill* v. *Duke of Devonshire*,[4] Lord O'Hagan, observed:—"The right of the sovereign exists in every navigable river where the sea ebbs and flows. Every such river is a royal river, and the fishing of it is a royal fishery, and belongs to the Queen by her prerogative.[5]

This is also the law of Scotland, for in *Lord Advocate* v. *Hamilton*,[6] which came before the House of Lords on appeal from the Court of Session in Scotland, Lord St. Leonards, L. C., in delivering his opinion, stated:—"With reference to the question which has been mooted as to the right of the Crown to the *alveus* or bed of a river, it really admits of no

[1] 10 H L. C. (593), 619. See also *R.* v. *Stimpson*, 32 L. J. M. C. 208; *Attorney-General* v. *Chambers*, *per* Alderson, B., 4 DeG. M. & G. 206; 23 L. J. Ch. 665; *Blundell* v. *Catterall*, *per* Bayley, J., 5 B & Ald. 304.

[2] 11 H. L. C. 192.

[3] 1 App. Cas. (662), 682.

[4] 8 App. Cas. (135), 157.

[5] Sir J. Davies, 56.

[6] 1 Macq. (H. L) 46.

dispute. Beyond all doubt the soil and bed of a river (we are speaking of navigable rivers only) belongs to the Crown."

And in the late case of *Orr Ewing* v. *Colquhoun*,[1] (which was a Scotch case too), Lord Blackburn quotes with approbation the following observation from the judgment of Lord Deas:—"The Crown holds the *solum* of the tidal part of the river as trustee for the whole public; but in the remaining portion of the river the proprietors of the banks are the proprietors of the *solum* of the river, and the right of navigation on the part of others requires use to found and support it;" and later on he himself observes:—"My Lords, where the property on the banks of a natural stream, above the flow of the tide, is in different persons, primâ facie, and until the contrary is shown, the boundary between their properties is the medium filum aquae. In this respect, there is no difference between the law of England and Scotland."

It might, perhaps, be said that the cases in which the above observations were made, did not directly raise for discussion the question, whether the ownership of the bed of a navigable river above the flow and reflow of the tide belongs to the Crown or not; still it must be admitted that these observations of the learned Lords as well as the dictum of Willes, J., represent such an overwhelming consensus of judicial opinion of the highest order that they far outweigh in point of authority any direct adjudication of the point.

The question, however, has been directly raised and decided in several cases in recent times, and the rule of law laid down in them may therefore be taken as perfectly established.

In the case of *Murphy* v. *Ryan*,[2] in which an action was brought for trespass to a fishery in the non-tidal part of a navigable river, and the defendant pleaded that the river was a royal river, and the right of fishery in the public, on demurrer to this plea, O'Hagan, J., delivering the judgment of the Court, held that above the flux and reflux of the tide, the soil and fishing of rivers were vested primâ facie in the riparian owners, and not in the Crown and the public, and this notwithstanding that the river was navigable, and had been immemorially navigated for commercial and other purposes.

This judgment of the Court of Common Pleas in Ireland has, as Lord O'Hagan observes in *Neill* v. *Duke of Devonshire*,[3] been followed in

[1] 2 App. Cas (839), 854 *Cf. Bickett* v *Morris*, L R. 1 H. L., Sc. 47

[2] Ir. R 4 C. L. 143.

[3] 8 App. Cas. (135,, 157.

several cases[1] decided in that country and has been constantly approved of and acted upon in England.[2]

In *Hargreaves* v. *Diddams*[3] and *Mussett* v. *Burch*,[4] the Court of Queen's Bench in England have held that where a river above the flux and reflux of the tide is made navigable by an Act of Parliament, and the public is allowed to navigate, but the soil and the rights of the riparian owners remain untouched by the Act, a claim by one of the public to fish in such waters cannot exist in law.

The point was directly raised and decided in the somewhat recent case of *Pearce* v. *Scotcher*,[5] in the Queen's Bench Division, where a complaint was lodged against the defendant under s. 24 of 24 and 25, Vict. c. 96 for having unlawfully and wilfully fished in the navigable portion of the river Dee, but above the flow and reflow of the tides, where there was a private fishery. The Court held that there could be no public right of fishery in non-tidal waters, even where they were to some extent navigable. Huddleston, B., observed:—"The distinction is clear upon the whole current of authorities in this country and in Ireland, that, where a river is navigable and tidal, the public have a right to fish therein as well as to navigate it; but that, where it is navigable but not tidal, no such right exists."

These authorities, therefore, fully establish the proposition that in England, Scotland, and Ireland the soil of a navigable river, up to the point where the tide of the sea flows and reflows, primâ facie belongs to the Crown, and that above that point, whether the river be navigable or not, the soil is presumed to belong to the riparian owners, usque medium filum aquae, *i. e.*, as far as the middle thread of the stream.

These decisions, it may be observed in passing, also involve a collateral proposition, to which I shall have occasion to advert again in a subsequent lecture,[6] that the public right of fishery is co-extensive with the right of the Crown to the soil of the river, and that it ceases to exist in law beyond the point where such right of the Crown ceases: and that the private right of fishery, (except where such fishery is claimed under a

[1] *Bloomfield* v. *Johnson*, Ir. R. 8 C. L. 68; *Bristow* v. *Cormican*, Ir. R., 10 Ch. 434; *per* Whiteside, C. J., *Neill* v. *Duke of Devonshire*, Ir. R., 2 Q. B., C. P. and Ex. D. 172.

[2] *Mussett* v. *Burch*, 35 L. T. (N. S.) 486, *per* Cleasby, B.; *Mayor &c. of Carlisle* v. *Graham*, L. R. 4 Ex. 361; *Reece* v. *Miller*, 8 Q. B. D. 626; *Neill* v. *Duke of Devonshire*, (135), 157, *per* Lord O'Hagan.

[3] L. R. 10 Q. B. 582. *Cf. Hudson* v. *Macrae*, 4 B. & S. 1585; 33 L. J. M. C. 65.

[4] 35 L. T. (N. S.) 486. [5] 9 Q. B. D. 162. [6] Lect. XII; *infra*.

grant from the Crown before Magna Charta) is co-extensive with the right of the riparian proprietors to the soil of the river, and that it ceases to exist below the point where the right of the Crown to the soil commences.

Tidality, only prima facie test of navigability.—At Common law, the flux and reflux of the tide affords a strong primâ facie presumption that the river is navigable, but it does not necessarily follow, because the tide flows and reflows in any particular place, that there is a public navigation, although the river may be of sufficient size. The strength of this presumption depends upon the situation and nature of the channel. If it is a broad and deep channel, calculated to serve for the purposes of commerce, it would be natural to conclude that there has been public navigation; but if it is a petty stream navigable only at certain periods of the tide and then only for a short time, and by very small boats, it is not a public navigable channel at all.[1] There are many small tidal creeks running into the estates of private owners on which a fishing skiff or other very small boats may be made to float at high water, but they are not deemed navigable rivers. The actual user of a tidal river for the purposes of navigation, is the strongest evidence of its navigability.[2]

Foundation of the ownership of the beds of tidal navigable rivers.—The real foundation of this ownership of the Crown in the soil of the bed of an estuary or of a tidal river, is, as has been declared in the case of the *Royal Fishery of the Banne*, the fact that up to the point reached by the flux and reflux of the tide, a river partakes of the nature of the sea, or, as Lord Hale describes it, is 'an arm of the sea.' This ownership, like that of the seashore, therefore, rested originally upon the old doctrine of the narrow seas, which, since the decision in *Reg.* v. *Keyn*,[3] may be regarded as wholly exploded. It must therefore now rest upon prescription or immemorial enjoyment by the Crown.

Ownership of the foreshore of tidal navigable rivers.—The foreshore of tidal navigable rivers, like the foreshore of the sea, is also vested primâ facie in the Crown, subject to the same restrictions and qualifications as those which attach to the Crown's ownership of the bed of such rivers, namely, the public rights of navigation and fishery.[4] Indeed, as

[1] *Rex* v. *Montague*, 4 B. & C. 598; *Mayor of Lynn* v. *Turner*, 1 Cowp. 86; *Miles* v. *Rose*, 5 Taunt. 705.

[2] *Miles* v. *Rose*, 5 Taunt. 705; *Vooght* v. *Winch*, 2 B. & Ald. 662. [3] 2 Ex. D., 63.

[4] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 12, 13; *Attorney-General* v.

has been already stated, the foreshore is a part of the bed of the river, and its ownership must consequently be governed by the same rule which regulates the ownership of the bed. As in the case of the foreshore of the sea, this ownership is also subject to a right of access by the public to the river.[1]

Alienability of the bed and foreshore of tidal navigable rivers.—The Crown could grant to a subject any portion of the bed and foreshore of a tidal navigable river, subject, of course, to the public right of fishery and navigation,[2] but since the passing of the statute[3] in the reign of Queen Anne, forbidding the alienation of Crown lands, no such grants can be made. It is scarcely necessary to repeat what I have already mentioned in the analogous case of the foreshore of the sea that, the Crown is still competent to make such alienations with the sanction of Parliament.[4]

Ownership of the beds of non-tidal rivers.—I have already to some extent anticipated the rule of law which governs the ownership of the bed of a fresh-water river or stream, or of that portion of a river which, though it mediately discharges its waters into the sea, is yet above the flux and reflux of the tide; but I recur to it here for the purpose of elucidating briefly the precise nature and limits of the rule.

Lord Hale says:—"Fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, usque filum aquae; and the owners of the other side the right of soil or ownership and fishing unto the filum aquae on their side. And if a man be owner of the land of both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience." "But special usage may alter that common presumption; for one man may have the river, and others the soil ad-

Chambers, 4 De G., M., & G. 206; *Lowe* v. *Govett*, 3 B. & Ad. 863; *Doe* dem. *Seeb Kristo Banerjee* v. *The East India Co.*, 6 Moo. Ind. App. 267; 10 Moo. P. C. C. 140; *Lord Advocate* v. *Lord Blantyre*, 4 App. Cas. 770.

1 *Supra*, 58; *Lyon* v. *Fishmonger's Company*, 1 App. Cas. 662; *North Shore Railway Co.* v. *Pion*, 14 App. Cas. 612. *Cf. Attorney-General of the Straits Settlement* v. *Wemyss*, 13 App. Cas. 192.

2 *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192; *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135; *Lord Advocate* v. *Lord Blantyre*, 4 App. Cas. 770.

3 1 Anne c. 7. s. 5.

4 *Supra*, 49—50.

jacent; or one man may have the river and soil thereof, and another the free or several fishing in that river."[1]

In *Bickett* v. *Morris*,[2] Lord Cranworth speaking with reference to a non-tidal stream, observes :—"By the law of Scotland, as by the law of England, when the lands of the two conterminous proprietors are separated from each other by a running non-tidal stream of water, each proprietor is primâ facie owner of the soil of the alveus or bed of the river, ad medium filum aquae. The soil of the alveus is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if from any cause, the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the alveus, each of them up to what was the medium filum aquae, in the same way as they were entitled to the adjoining land."[3]

The rules deducible from the law laid down in the above passages may be shortly formulated thus:—

(*a*) The ownership of the soil of the alveus or bed of a non-tidal stream, whether it be navigable or not, primâ facie belongs to the riparian proprietors on both sides, not in common, but in severalty, the medium filum aquae or the middle thread of the stream, being the dividing line between the shares of the two proprietors respectively.

(*b*) As a corollary of this rule, if the course of such a stream be permanently diverted, and the old alveus or bed be left dry, each riparian proprietor becomes entitled to it up to the line which coincides with what was the middle thread of the stream.

(*c*) When the lands on both banks of such a stream belong to the same person, the presumption of law (though rebuttable) is, that the ownership of the whole alveus or bed belongs to him.

(*d*) The ownership of the alveus or bed of such a stream may be claimed by a person who does not own land on either bank of it, though this is generally not the case.

Foundation of such ownership.—The right of a riparian proprietor to the soil of the bed of a non-tidal river depends not upon nature, but

[1] De Iure Maris, p. 1. c. 1 ; Hargrave's Law Tracts, 1.

[2] L. R. 1 H. L. Sc. (47) 57.

[3] *Wishart* v. *Wyllie*, 1 Macq. H. L. C. 389 ; *Carter* v. *Murcot*, 4 Burr. 2162 ; *Reg.* v *Inhabitants of Landulph*, 1 Moo. & R. 393 ; *Middleton* v. *Prichard*, 3 Scam. (Ill.) R. 520 ; *Wright* v. *Howard*, 1 Sim. & St. 203 ; Schultes' Aquatic Rights, 136 ; 3 Kent's Comm. 428.

on grant or presumption of law.[1] Consequently, such presumption of ownership is capable of being repelled by showing the express terms of a counter grant or by evidence of exclusive exercise of acts of user of the whole bed whether by the proprietor of the land on either side of the stream,[2] or by a stranger. In that case, the boundary line between the estates of the proprietors of the bed of the river and of the adjacent land respectively would seem to be the bank, as already defined.

Construction of grants bounded by a non-tidal river.—A grant of land expressed to be bounded by a non-tidal river is construed in general to carry the title of the grantee to the middle thread of the stream, unless the language of the instrument, taken in connection with the surrounding circumstances,[3] indicate a clear intention to the contrary.[4] "In my opinion," says Cotton, L. J., in *Micklethwait* v. *Newlay Bridge Company*,[5] "the rule of construction is now well-settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to shew that that is not the intention of the parties." This rule does not owe its origin to any peculiar doctrine of the English Common law, but is founded upon a principle universally applicable, namely, that it would be absurd to suppose that the grantor reserved to himself the right to the soil ad medium filum, which in the great majority of cases is useless and wholly unprofitable.[6]

1 *Per* Lord Selborne, *Lyon* v. *Fishmongers Co.*, 1 App. Cas. 662.

2 *Jones* v. *Williams*, 2 M. & W. 326. *Cf. Bristow* v. *Cormican*, 3 App. Cas. 641.

3 *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263.

4 *Lord* v. *The Commissioners of Sydney*, 12 Moo. P. C. C. 473; *Plumstead Board of Works* v. *British Land Co.*, L. R. 10 Q. B. 24, *per* Blackburn, J.; 3 Kent's Comm. (10th Ed.) 560, 564; Elphinstone and Clerk's Interpretation of Deeds, 180-182; Hunt on Boundaries (3rd Ed.) 3, 25; *The City of Boston* v *Richardson*, 113 Allen, 144, 154.

5 33 Ch. D. 133; *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263; *Becket* v. *Corporation of Leeds*, L. R. 7 Ch. App. 461; *Marquis of Salisbury* v. *Great Northern Ry. Co.*, 5 C. B. (N. S.) 174. *Cf. Berridge* v. *Ward*, 10 C. B. (N. S.) 400, (as to highway). *Dist. Leigh* v. *Jack*, 5 Ex. D. 264, (where the presumption was rebutted).

6 *Lord* v. *The Commissioners of Sydney*, 12 Moo. P. C. C. 473. The soil of the bed is sometimes, (though indeed very seldom) appropriated by the construction of pillars or piers for the support of bridges.

The reason upon which this rule is founded is very lucidly and forcibly stated by Redfield,

Although at Common law all rivers and streams above the flow and reflow of the tide, are primâ facie deemed to be private, yet in England, many have become subject to the public right of navigation by immemorial user[1] or by Act of Parliament. When an Act of Parliament, conferring the public right of navigation in a river, does not expressly touch or affect the rights of the riparian proprietors to the soil of the alveus or bed, neither any right of property in the soil nor any right of fishing can be acquired on the part of the public merely by reason of such navigation.[2]

A grant by the Crown of land bounded by a non-navigable creek was held to pass the soil of the creek ad medium filum aquae, as the description of the boundaries in the grant did not exclude from it that portion of the creek which by the general presumption of law would go along with the ownership of the land on its banks.[3]

Right of towage.—The banks of all tidal navigable rivers above high-water mark, and the banks of all non-tidal navigable rivers up to the edge of water, being the property of private individuals, it has been held in England overruling some earlier decisions and dicta to the contrary,[4] that the public have no Common law right to pass over them

J., in the opinion delivered by him in *Buck* v. *Squires*, 22 Vt. (484), 494, partially quoted in Gould on Waters, § 46, (note) 3:—

"The rule itself is mainly one of policy, and one which to the unprofessional might not seem of the first importance; but it is at the same time one which the American Courts, especially, have regarded as attended with very serious consequences, when not rigidly adhered to; and its chief object is, to prevent the existence of innumerable strips and gores of land, along the margins of streams and highways, to which the title, for generations, shall remain in abeyance, and then, upon the happening of some unexpected event, and one, consequently, not in express terms provided for in the title deeds, a bootless, almost objectless litigation shall spring up to vex and harrass those, who in good faith had supposed themselves secure from such embarrassment. It is, as I understand the law, to prevent the occurrence of just such contingencies as these, that in the leading, best reasoned, and best considered cases upon this subject it is laid down and fully established that Courts will always extend the boundaries of land deeded as extending to and along the sides of highways and fresh-water streams, not navigable, to the middle of such streams and highways, if it can be done without manifest violence to the words used in the conveyance."

[1] *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 838.

[2] *Hargreaves* v. *Diddams*, L. R. 10 Q. B. 582; *Mussett* v. *Burch*, 35 L. T. (N. S.) 486.

[3] *Lord* v. *Commissioners of Sydney*, 12 Moo. P. C. C. 473; *Crossley* v. *Lightowler*, L. R. 3 Eq. 279.

[4] *Young* v. —— 1 Ld. Raym. 725; *Queen* v. *Cluworth*, 6 Mod. 163; *Pierse* v. *Fauconberg*, 1 Burr. 292; Hale, de Portibus Maris, p. 2. c. 7; Hargrave's Law Tracts, 85—87.

for the towage[1] of boats, or to use them, except in cases of peril or emergency, for landing and embarkation, or for the mooring of vessels.[2] Any navigator who does any of these acts is liable in trespass to the riparian owner, who may, in the alternative, demand from him such charge as he likes for the use of the bank, provided he gives notice of it before the bank is so used.[3]

The right to tow on the banks of navigable rivers, being in the nature of a right of way,[4] may be acquired by the public by grant, dedication, custom or prescription,[5] and Lord Kenyon suggested that small evidence of user would be sufficient before a jury to establish the right by custom upon grounds of public convenience.[6] The right may also be conferred on the public by statute.[7]

In all these cases, the right of the riparian owner to the soil of the bank remains intact unless, where the right to tow is conferred by statute, it is taken away thereby in express terms.[8]

Drying nets on the bank.—Fishermen, as such, have no right to dry their nets on the bank either of a tidal or of a non-tidal river, or to use it for any purpose accessory to fishing, but they may acquire such right by prescription.[9]

1 *Ball* v. *Herbert*, 3 T. R. 253. In America, the rule varies in different states; some have adopted the doctrine of the Civil law and recognize the right of the public to tow on the banks of navigable rivers; others, however, have implicitly followed the Common law rule. Angell on Watercourses (7th Ed.) §§ 552—553; Angell & Durfee on Highways (3rd Ed.), §§ 74—75.

2 *Cf. Ibid; Williams* v. *Wilcox*, 8 Ad. & El. 314; *Blundell* v. *Catterall*, 5 B. & Ald. 268; *Gray* v. *Bond*, 2 Brod. & Bing. 667; Gould on Waters, § 99, and the American authorities cited in notes 1 and 2 to that section.

3 *Steamer Magnolia* v. *Marshall*, 39 Miss. 109; *Morgan* v. *Reading*, 3 S. & M. 366; *Commissioners* v. *Withers*, 29 Miss. 21, cited in Gould on Waters, § 99, note 5.

4 *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 838.

5 *Supra*, note 3. *Cf. Winch* v. *Conservators of Thames*, L. R. 7 C. P. 458; 41 L. J. C. P. 241; *Badger* v. *S. Y. R. Co.*, 1 E. & E. 347; *Monmouth Canal Co.* v. *Hill*, 4 H. & N. 427; *Kinlock* v. *Neville*, 6 M. & W. 795; *Hollis* v. *Goldfinch*, 1 B. & C. 205; Angell on Tide Waters, 176; Angell on Watercourses (7th Ed.) § 551; Woolrych on Waters (2nd Ed.) 164; Gould on Waters, §§ 101, 104.

6 *Ball* v. *Herbert*, 3 T. R. 253.

7 *Winch* v. *Conservators of the River Thames*, L. R. 7 C. P. 471; *Lee Conservancy Board* v. *Button*, 12 Ch. D. 383.

8 *Ibid.*

9 *Gray* v. *Bond*, 2 Brod. & Bing. 667; 5 J. B. Moore, 527.

LECTURE IV.

NAVIGABLE AND NON-NAVIGABLE RIVERS.

Remarks on the use of the expression 'non-navigable river'—Rules of the Roman Civil law with regard to navigable rivers, a more valuable guide than the doctrines of the English law concerning tidal rivers, in solving legal questions with respect to rivers in India—I. Classification of rivers and streams according to the Roman law into perennia and torrentia—Public rivers—Test of navigability—Navigability not an essential ingredient of a public river—Agri limitati and agri arcifinii—Ownership of the beds of rivers and streams—Conflicting theories with regard to such ownership—Ownership of the banks of rivers—Public uses to which they are subject—II. Doctrine of tidality not recognized by the law of France—Under that law, rivers classified into such as are navigable, 'flottables,' or such as are not—A navigable or a 'flottable' river, what—Ownership of the beds of navigable or 'flottables' rivers—Ownership of their banks—Divergent opinions as to the ownership of the beds of streams which are neither navigable nor 'flottables.'—III. Question as to the ownership of the beds of rivers more fully investigated in America than in any other country—Different doctrines adopted by different states—Reasons stated by Judge Turley of Tennessee for rejecting the doctrine of tidality—Test of navigability—Whether rights of riparian proprietors in the United States are limited by the survey lines run on the top of the bank, or whether they extend down to water's edge—Conflicting decisions as to the ownership of the foreshore—Divergent opinions as to the ownership of the banks of navigable rivers—IV. In India, classification of rivers into navigable rivers and non-navigable streams alone recognised—Test of navigability—Ownership of the beds of navigable rivers—*Doe* d. *Seeb Kristo Banerjea* v. *The East India Company*—Discussion of other cases bearing upon the same question—Ownership of the beds of 'small and shallow' rivers or non-navigable streams—Discussion of authorities—*Khagendra Narain Chowdhry* v. *Matangini Debi*—Investigation of the foundation of the rule regarding ownership of small streams unnecessary in India—Ownership of the foreshore of a tidal navigable river—Ownership of the banks of navigable rivers.

Right of towage—Right of towage according to Roman law and the law of France.

Having in the preceding lecture discussed at length the law relating to the ownership of the beds and banks of tidal and non-tidal rivers, it remains for me now to call your attention to the law regarding the ownership of the beds and banks of navigable and non-navigable rivers. The expression 'non-navigable river' by reason of a narrower meaning having been assigned to the second term in popular language, as excluding small streams, may seem somewhat incongruous, but the larger signification which it has acquired in law and to which I have already so fully adverted, renders the use of it, at least in legal phraseology, less open to any such objection.

The division or classification of rivers, according as they do or do not possess the character of navigability, for the purpose of determining the ownership of their beds, and the rights of the public as well as of private individuals over their waters, obtains in the jurisprudence of most of the states in the continents of Europe and America. The large rivers that traverse the countries which at one time composed the vast territory of the Roman Empire have a greater resemblance to the rivers of India than those which course through the island of Great Britain. Consequently rules propounded in the most matured, if ancient, legal system of that Empire for the solution of the manifold questions which arise with regard to rivers cannot fail to furnish a far more infallible guide in the determination of similar questions with respect to rivers in India than the technical and perhaps narrow doctrines of this branch of the Common law of England, forced in a great measure, as they undoubtedly were, by the smallness of her rivers, which are navigable above the tide by small crafts only. I shall therefore first of all turn to the Roman law.

I. **Classification of rivers according to Roman law.**—A river (flumen) according to that law is distinguished from a stream (rivus) by its greater magnitude or by the reputation it bears among the surrounding inhabitants.[1] Rivers (flumina) are then classified into *perennia* (permanent) *i. e.*, rivers which flow all the year round, and *torrentia*, *i. e.*, winter torrents that leave their beds dry in the summer. If a perennial or permanent river, which generally flows all the year round, dries up in any summer, it does not thereby forfeit its distinctive character.[2]

Public rivers.—"Of rivers" says Ulpian, "some are public, some are not. A public river is defined by Cassius to be one that is perennial. This opinion of Cassius which Celsus also corroborates, seems to be reasonable."[3]

Therefore, according to this text, all perennial rivers are public rivers

1 Flumen a rivo magnitudine discernendum est aut existimatione circumcolentium. Dig. xliii. 12. 1. 1, (Ulpian.)

2 Item fluminum quaedam sunt perennia, quaedam torrentia. perenne est quod semper fluat, torrens, id est, hyme fluens. Si tamen aliqua aestate exaruerit, quod alioquin perenne fluebat, non ideo minus perenne est. Dig. xliii. 12. 1. 2, (Ulpian).

3 Fluminum quaedam publica sunt, quaedam non. publicum flumen esse Cassius definit, quod perenne sit: haec sententia Cassii quam et Celsus probat, videtur esse probabilis. Dig. xliii. 12. 1. 3, (Ulpian). The passage in the Institutes: 'flumina autem *omnia* et portus publica sunt' (Inst. ii. 1. 1,) is opposed to the above text of Ulpian as well as to the following excerpt from Marcian; 'sed flumina *paene* omnia et portus publica sunt' Dig i. 8 4. 1.

and the rest are private. They are said to be public, not in the sense that the ownership of the soil of their bed belongs to the public, but in the sense that they are intended for the use of the public, or in other words, that they are subjected by the law to a kind of servitude in favour of all members of the state.

Test of navigability.—Public rivers are then divided into such as are navigable and such as are not navigable.[1] A river, according to that law, is said to be navigable if it is navigable either by boats or by rafts:

"Under the appellation navigium" (a vessel or a boat),—says Ulpian, "rafts also are included, because the use of rafts is very often necessary."[2]

Navigability not essential to constitute a public river.—This division of public rivers into navigable and non-navigable rivers, is made not for the purpose of discriminating the nature of the ownership of their alveus or bed, but for the purpose of determining the particular Interdict which would be applicable to one kind of public river or the other, the Interdict applicable to navigable rivers or to the navigable portion of a river, being different from the Interdict applicable to non-navigable rivers or to the non-navigable portion of the same river;[3] though doubtless for some purposes, the same Interdict was applicable to both kinds of rivers.[4]

Navigability has been regarded by some learned text-writers as forming an essential element in the constitution of a public river under the Roman law. But this, if I may venture to state, is probably not so. The passages in the Digest, bearing upon this point, warrant the inference that non-navigable rivers[5] were as much public as navigable rivers, if

[1] The following texts bear out the position that not only navigable rivers, but also non-navigable rivers were public under the Roman law, if they were perennial:—'Ergo hoc interdictum ad ea tantum flumina publica pertinet, quae sunt navigabilia, ad cetera non pertinet'. Dig. xliii. 12. 1. 12, (Ulpian). 'Sed et si in flumine publico, non tamen navigabili fiat, idem putat'. Dig. xliii. 12. 1. 18, (Ulpian). 'Quominus ex publico flumine ducatur aqua, nihil impedit (nisi imperator aut senatus vetet), si modo ea aqua in usu publico non erit: sed si aut navigabile est aut ex eo aliud navigabile fit, non permittitur id facere'. Dig. xliii. 12. 2, (Pomponius). 'Pertinet autem ad flumina publica, sive navigabilia sunt sive non sunt. Dig. xliii. 13. 1. 2, (Ulpian). *Cf.* J. Voet, Comm. ad Pand. lib. xliii. t. 12. §§ 12, 13; Pothier, Pandectae, lib. xliii. t. 12. art. 1. § 3.

[2] Navigii appellatione etiam rates continentur, quia plerumque et ratum usus necessarium est. Dig. xliii. 12. 1. 14, (Ulpian).

[3] Dig. xliii. 12. 1. 12, 17, 18. [4] Dig. xliii. 13. 1. 2.

[5] The use of the banks of all perennial rivers being public under the Roman law there could be no difficulty in their making use of non-navigable rivers also, *e. g.*, by taking water. Dig.

they were only perennial. Gothofred in a note upon the passage, 'pertinet ad flumina publica, sive navigabilia sunt, sive non sunt'[1], (*i. e.*, this (Interdict) applies to all public rivers, whether they be navigable or not), says, 'flumen non fit publicum sola navigandi utilitati. Nam flumen publicum esse potest, et tamen non navigabile', (*i. e.*, rivers do not become public merely by reason of their suitability for navigation. Because, a river may be public even though it be not navigable). Of course, such Interdicts as are intended for the protection of the public right of navigation, can apply only to such public rivers as are, in fact, navigable, and as far as they are so navigable.[2] Interdicts which are intended for the preservation of the banks of rivers, for the maintenance of the flow of their water without diminution or diversion, or for the removal of obstructions from their channel, apply to all rivers whether they are navigable or not.[3] There were some Interdicts which were specially applicable to non-navigable public rivers.[4]

It is also evident from what I have already said, that under the Roman law the flux and reflux of the tides of the sea formed no factor whatever in determining the rights of the public or of the riparian owners with regard to rivers generally.

Agri limitati and agri arcifinii.—Under the Roman law, lands were divided into two principal[5] classes, agri limitati, *i. e.*, limited lands, and agri arcifinii, *i. e.*, 'arcifinious' lands. Lands obtained generally by conquest and distributed amongst the soldiery, or granted to private individuals by the state, as comprised within certain defined limits or boundaries, such as roads or paths, were called agri limitati, an appellation given to them because they were enclosed by certain artificial limits; whereas all lands bounded by natural limits such as rivers, woods or mountains, were called agri arcifinii,[6] because, according to Varro, these natural objects

xliii. 12. 2), or by fishing, ('ius piscandi omnibus commune est in portubus fluminibusque'. Inst. ii. 1. 1.)

[1] Dig. xliii. 13. 1. 2.

[2] Dig. xliii. 14.

[3] Dig. xliii. 13.

[4] Dig. xliii. 12. 1. 12, 18.

[5] Ager assignatus or assigned land was merely a species of ager limitatus. Land given by a certain measure only, as by so many acres, was known by the special term ager assignatus. Grotius, de Iur. Bell. et. Pac. lib. ii. c. 3. § 16; Vinnius, Comm. ad Inst., lib. ii. t. 1. text. De alluvione.

[6] Dig. xli. 1. 16; Grotius, de Iur. Bell. et Pac. lib. ii. c. 3. § 16, and Barboyrac's notes thereto. Arcifinius, scilicet, qui non alium finem ea parte habet quam naturalem, id est, ipsum flumen. Ager limitatus dictus fuit ager ex hostibus captus, et deinde à populo vel Principe privatis ita possidendus datus, ut certis limitibus sive finibus ius possessoris circumscriberetur.

also served as 'fines arcendis hostibus idoneos,' *i. e.*, boundaries fit to keep the enemies out.[1]

Ownership of the beds of rivers and streams.—The ownership of the alvei or beds of private rivers belonged to them through whose land they flowed. The ownership of the alvei or beds of public rivers which flowed through agri limitati or limited lands, belonged not to the proprietors of such lands but to the state,[2] because the very nature of the grants under which they held forbade any presumption of ownership in their favour. But if such a river ran between agri arcifinii or 'arcifinious' lands, then, whether the river was navigable or not, the ownership of its alveus or bed, after it became dry, belonged to the proprietors of lands on its adjacent banks. "If," says Pomponius quoting Celsus the younger "on the bank of a river which is adjacent to my land, a tree grows, it is mine, because the soil itself is my private (property), although the use of it is considered to belong to the public. So too the bed, when it becomes dry, becomes the property of those nearest to it, because the public no longer use it."[3]

But with regard to the ownership of the alveus or bed of a public river running through 'arcifinious' lands, when such alveus or bed remains covered by water, rival theories have been in existence. The earlier commentators and interpreters of the Roman law maintained that, in legal contemplation the bed was always the property of the riparian owners, whether water flowed over it or not, subject, of course, in the former case to the right of the public to use the river or its water for certain purposes.[4] The modern expositors, however, affirm that the

Limitatis agris similes sunt, qui certa mensura comprehenduntur. Vinnius, Comm. ad Inst., lib. ii. t. 1. text. De alluvione.

Heineccius apparently uses the term ager adsignatus with regard to that description of land to which Grotius and Vinnius apply the term ager limitatus.

Veteres Romani agros dividebant in arcifinios, limitatos et adsignatos. Arcifinii sunt, qui non alios habent fines, quam naturales, veluti montes, flumina &c.: limitati, qui ad certam mensuram possidentur: adsignati, qui per extremitatem mensurae comprehenduntur. Heineccius, Recit. Iur. § 358.

[1] Grotius, de Iur. Bell. et Pac., lib. ii. c. 3. § 16.

[2] Ut sciretur, quod extra hosce fines esset, id publicum manere. Vinnius, Comm. ad Inst., lib. ii. t. 1 text. De alluvione.

[3] Celsus filius, si in ripa fluminis, quae secundum agrum meum sit, arbor nata sit, meam esse ait, quia solum ipsum meum privatum est, usus autem eius, publicus intelligitur. et ideo cum exsiccatus esset alveus, proximorum fit, quia iam populus eo non utitur. Dig. xli. 1. 30. 1.

[4] Grotius, de Iur. Bell. et Pac., lib. ii. c. 8. § 8; J. Voet. lib. i. t. 8, § 9; Vinnius, Comm.

bed of a public river, so long as it remains covered by water, was by that law, considered as res nullius, or no man's property.[1] The sources do not furnish us with any direct or positive text decisive of the question, nor is it at all possible from the materials contained in them to deduce any coherent theory, such as will harmonise with the somewhat peculiar, unsymmetrical and, in some respects, even illogical, doctrines of the Roman law with respect to alluvion, islands springing up in a river, and dereliction of a river-bed. If, on the one hand, as the adherents of the former opinion chiefly argue, the bed of a public river is res nullius, then islands and derelict beds should, reasoning in accordance with the theory of the Roman jurists with regard to occupancy, be held to belong to the first occupant, and not to the riparian proprietors. But this would, doubtless be opposed to the acknowledged doctrines of the Roman law, which, as I shall show hereafter, assigned the ownership of islands and derelict beds to the owners of lands on the adjacent banks. If, on the other hand, as the supporters of the latter theory contend, the bed is the property of the riparian owners, then it ought always to remain as such, whether it be covered by water or not, and it is wholly superfluous to resort to the peculiar doctrine of alluvion,—the acquisition of ownership in lands added by gradual and imperceptible accession,—to account for the ownership of a portion of the bed of a river adjacent to the bank when the water retires from it in consequence of a deposit of soil thereon. Nor, on that assumption, does there seem to be any foundation in justice for the doctrine of avulsion; for why should soil, violently severed from one's land and deposited over a site belonging to another, belong to the former, by reason of such violent severance alone, and the latter be thus deprived, not on account of any fault of his own, of the ownership of the site which ex hypothesi belongs to him?[2] I may add that the advocates of the first theory also

ad Inst., lib. ii. t. 1. text. De usu et proprietate riparum; De insula, ('ego non aliam huius acquisitionis rationam esse arbitror, quam quod insula alvei pars fit, alveus pars censeatur vicinorum praediorum').

[1] 1 Moyle, Imp. Inst. Inst. 190 (note to § 19), which professedly embodies the result of the latest German researches in Roman law. Markby's Elements of Law (3rd ed.), 238. § 493, which also is apparently based upon the German authorities.

[2] It is this incongruence in the doctrines of the Roman law with regard to alluvion that called forth from Grotius and Puffendorf the remark that they are founded not so much on natural law, which they profess to be, as on the positive usages or ordinances of particular nations. Grotius, de Iur. Bell. et Pac. lib. ii. c. 8. § 8; Puffendorf, de Iur. Nat. et Gent. lib. iv. c. 7. § 11.

rely, in proof of their position, upon the further fact that, under the Roman law riparian proprietors were competent to erect works even in the bed of a public river for the protection of the banks or of the adjoining lands, provided they did not thereby interfere with the navigation of the river by the public, deflect the course of the stream, or otherwise cause any injury to the rights of the upper and the lower riparian proprietors.[1]

Ownership of the banks of rivers.—The ownership of the banks of rivers according to the Roman law belonged to the proprietors of the adjoining lands, subject however to the use of the public for navigation and other purposes. The rule is thus laid down in the Institutes :—

" Again the public use of the banks of a river, as of the river itself, is part of the law of nations; consequently, every one is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting place for the cargo, as freely as he may navigate the river itself. But the ownership of the bank is in the owner of the adjoining land, and consequently so too is the ownership of the trees which grow upon it."[2]

A comparison of the above passage with that relating to the public use of the seashore[3] under Roman law shows, that according to that law, the public had no right to use the banks of a river for the purpose of drying their nets and hauling them up from the river.[4]

II. **Doctrine of tidality not recognised by French law.**—Turning next to the law of France, one seeks in vain to discover in it any trace of that doctrine which presumes the ownership of the bed of the river to be vested in the Crown or in the subject, according as it is or is not within the flux and reflux of the tide. The legal system of that country built upon the substructure of the Roman jurisprudence, supplemented and slightly modified by the customary laws of the provinces and ultimately consolidated, re-modelled and partially reconstructed by the Code Napoleon, could hardly receive into its edifice a doctrine so utterly repugnant to its framework and style.

Classification of rivers according to French law.—The Code Civil

[1] 'Quominus illi in flumine publico ripave eius opus facere ripae agrive qui circa ripam est tuendi causa liceat, dum ne ob id navigatio deterior fiat'. Dig. xliii. 15. 1, (Ulpian). *Cf.* J. Voet, Comm. ad Pand. lib. i. t. 8. § 9.

[2] 2 Moyle, Imp. Inst. 36; Inst. ii. 1. 3, 4; Dig. i. 8. 5.

[3] Inst. ii. 1. 5; *supra*, 40. *Cf.* Dig. i. 8. 5. 'retia siccare et ex *mare* reducere' (Gaius).

[4] Nor does the law of France allow such a liberty to fishermen. Sirey, Les Codes Annotes; v. 1, § 650, note (no. 17.)

contains no separate article classifying rivers and streams according as they are navigable, 'flottables' or not, but various provisions are laid down therein by which the rights of the state, the public and of the riparian proprietors respectively with regard to rivers and streams are discriminated and regulated according as such rivers and streams are navigable, 'flottables' or not.[1] It may therefore be safely stated that all rivers and streams according to that law are distinguished into such as are navigable or 'flottables' and such as are not. The Code contains no definition of a navigable or 'flottable' river, but there have been judicial decisions in France by which the precise significations of those words have been to some extent determined.

Test of navigability.—A river is said to be navigable or 'flottable' when it is navigable for boats, flats and rafts. A river which floats logs only, and is incapable of floating boats or rafts laden with articles of merchandise, does not come under the denomination of a 'flottable' river;[2] nor does a river fall within the category of a navigable or 'flottable' river, merely because the dwellers on its banks employ some means of navigation for the purpose of crossing it.[3] In short, it is the possibility of the use of the river for transport in some practical and profitable way, which forms the real test of navigability under that law.[4] The navigability of a river, is, in France, determined by the administrative authority.

Ownership of the beds of navigable or 'flottables' rivers.—The beds of rivers and streams which are navigable or 'flottables' in the above sense, are under that law considered as dependencies on the public domain, that is to say, as the property of the state.[5]

Ownership of the banks of rivers.—The ownership of the banks of rivers whether navigable or 'flottables' or not, belongs to the owners of the adjacent lands and the limit which separates the bed from the bank, that is to say, the public domain from the property of the riparian

[1] *Cf.* Code Civil, §§ 538, 556, 559, 560, 561, 562, 563.

[2] Sirey, Les Codes Annotes, v. 1. § 538, note (nos. 15, 16).

[3] *Ibid.* note (no. 15).

[4] It was so held by the Judicial Committee of the Privy Council in *Bell* v. *Corporation of Quebec*, 5 App. Cas. 84, on appeal from a judgment of the Court of Queen's Bench for the province of Quebec, in Canada, where the old French law prevails. The opinion was based solely on the French authorities. It is worthy of note that at the locus in quo the river was tidal, and yet the Courts deemed it necessary to decide whether it was navigable or 'flottable' or not.

[5] Sirey, Les Codes Annotes, v. 1. § 538.

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owners, is fixed at the point which the highest water in the normal condition of the river or stream reaches, and above which the water commences to overflow.[1] It is the administrative authority alone, to the exclusion of the judicial, to which appertains the province of determining the extent and the limits of the beds of navigable rivers or streams.[2]

Ownership of the beds of streams neither navigable nor 'flottables'. —The question relating to the ownership of the beds of streams which are neither navigable nor 'flottables,' has been the subject of much controversy and of no less conflicting opinions in France. There appear to be three systems in competition. According to one, the small streams or watercourses neither navigable nor 'flottables,' are like the navigable or 'flottables' rivers, the property of the state. This opinion is advocated by Merlin, Proudhon, Royer-Collard, and a few others, and also countenanced by some judicial decisions.[3] A second system is supported by other text-writers in much greater number, who on the contrary maintain that, the small streams and watercourses, neither navigable nor 'flottables,' are the property of the riparian owners. Of these, it is sufficient to mention the names of Vaudore, Toullier, Pardessus, Daviel and Troplong, though there are several others besides, who equally entertain the same opinion. This too is sustained by various judicial decisions.[4] Between these two systems is interposed a third, which assigns the ownership of the beds of non-navigable streams to the riparian owners, (the flowing water not being the property of any one), subject, so long as they are covered with water, to certain servitudes in favour of the public. This is maintained by Devilleneuve, Carrette, Comte, Tardif, Cohen, and Dufour.[5]

Under the system which asserts the right of the riparian proprietors to the beds of non-navigable streams and watercourses, the bed is declared to belong to them in common, pro indiviso, and not in severalty, each up to the central line of the stream. But this community of interest does not prevent rules being made for the distribution of the water among the riparian proprietors.[6]

[1] Sirey, Les Codes Annotes, v. 1. § 538 note (no. 22.) It has, however, been laid down in Rouen that this limit is determind by the line reached by the water when it is at its mean level. *Ibid.*, note (no. 21).

[2] *Ibid.*, § 538 note (no. 23.)

[3] *Ibid.*, § 538 note (nos. 26, 29.)

[4] *Ibid.*, § 538 note (nos. 27, 30.)

[5] *Ibid.*, § 538 note (no. 28.)

[6] *Ibid.*, § 538 note (no. 32.)

Under the feudal system as it prevailed in France, the property in small streams belonged to the ancient seigneurs. The laws by which that system has been abolished, have not at all interfered with the grants made before such abolition, nor have they invalidated the onerous titles created by the ancient seigneurs in water-courses situated in their seigneuries.[1] It is evident from this that, in France a subject cannot claim the ownership of the bed or of the soil between high and low-water mark of a navigable or 'flottable' river under a grant from the state, unless it had been obtained before the abolition of the feudal system.

III. **Ownership of the beds of rivers under the American law.**—The subject has undergone a far more thorough, comprehensive and searching investigation in America than in any other country. The abundance of rivers of every description from the grand and magnificent Mississippi to the comparatively unimportant streams in the New England States, the birth of opulent cities, the rapid growth of inter-state commerce, the daily increasing development of agricultural and manufacturing industries, and the vast accumulation of wealth generally, have all contributed to raise up before the courts of that country a variety of questions relating to the rights of the public and of private individuals in rivers both below and above the tide, which however depend, more or less, for their ultimate solution upon the determination of the ownership of the soil of the bed of such rivers as well as of their banks. Originally borrowing their jurisprudence from the doctrines of the Common law of England, the various states in America were primâ facie bound to adhere to the Common law definition of rivers, and accordingly such states as New Jersey, Delaware, Maryland, Georgia, Massachusetts, New Hampshire, Connecticut, Maine, Virginia, Ohio, Udiana, Vermont, Kentucky[2] and Illinois, where the rivers are com-

[1] Sirey, Les Codes Annotes, v. 1. § 538, note (no. 33).

[2] In *Berry* v. *Smyder*, 3 Bush, 266, (decided in Kentucky and cited in a note to § 62 of Gould on Waters), Williams, J., suggested new reasons for the distinction drawn between the titles to the beds of fresh and salt-water rivers respectively. He said:—"So long as the ocean keeps its bed, and nature's present frame shall continue to exist, there will always be water up to the ocean's level in all those channels where the tide ebbs and flows, and this not dependent upon the water falling in rain; therefore, those channels are filled to ocean's level twice every twenty-four hours, and are constantly and uniformly navigable. Their navigability does not depend upon a season more or less rainy, but on the constant, unvarying laws of nature and will remain as surely navigable as the sea itself. Though not so deep, their surface level is the same; hence, without violence of expression or idea, they are called arms

paratively small and unimportant, have laid down the rule of tidality as determining the ownership of the bed of a river and the right of fishing in its waters; on the other hand, Pennsylvania, North Carolina, Iowa, Missouri, Tennesse, Alabama and one or two other states, where the rivers are navigable for several hundreds of miles above the reach of the tides and upon whose broad expanse an almost oceanic commerce is carried on, have liberated themselves from the trammels of the Common law, and laid down navigability in fact as the only rational test of navigability in law, and as determining their amenability to the Admiralty jurisdiction, and the proprietorship of the beds and banks of such rivers.[1]

Judge Turley of Tennesse has adduced most excellent reasons for rejecting the doctrine of tidality in countries where the rivers are large and navigable far above the tide. "All laws," he observes, "are, or ought to be, an adaptation of principles of action to the state and condition of a country, and to its moral and social position. There are many rules of action recognised in England as suitable, which it would be folly in the extreme, in countries differently located, to recognise as law; and, in our opinion, this distinction between rivers 'navigable' and not 'navigable,' causing it to depend upon the ebbing and flowing of the tide, is one of them. The insular position of Great Britain, the short courses of her rivers and the well known fact that there are none of them navigable above tide water but for very small crafts, well warrants the distinction there drawn by the Common law. But very different is the situation of the continental powers of Europe in this particular. Their streams are many of them large and long and navigable to a great extent above tide water; and accordingly we find that the Civil law which regulates and governs these countries, has adopted a very different rule."[2]

of the sea. But it is different with all the great rivers of the earth above tide water. These are dependent for their supply from the clouds."

[1] Gould on Waters, §§ 56-75; Angell on Watercourses (7th ed.), §§ 546-549; Houck on Navigable Rivers, §§ 50-120; Angell on Tide Waters, 38, 76; Hall on the Seashore (2nd ed.), 3 (note f).

[2] *Elder* v. *Burrus*, 6 Humph. (Tenn.) 366, cited in Angell on Watercourses (7th ed.), § 549. Cf. *Barney* v. *The City of Keokuk*. Sup. Ct. U. S. Oct. T. 1876, 4 Centr. Law Journ. 491, 494; 94 U. S. 324, (cited in a note to the same section) where Bradley, J., said:—"The confusion of navigable with tide water, found in the monuments of the Common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Island, and that of the American Continent. It had the influence for two generations of excluding the Admiralty jurisdiction from our great rivers and inland seas.

Test of navigability.—In America, rivers are said to be navigable in fact (in so far as that quality is regarded as a criterion for determining the ownership of their bed), when they are used or are susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[1]

Mr. Houck's opinion as to the survey lines run on the top of the banks being the limits of estates.—Closely allied to the main topic under discussion is the point arising out of the system of surveys and grants of public lands under the laws of the United States, which it will be convenient to notice now. It has an important bearing upon certain theories advanced by the learned author of "The Law of Navigable Rivers" with regard to the law of alluvion, which I shall have occasion to notice and comment upon in a subsequent lecture.[2] In an argument certainly remarkable for much plausibility and research, he has contended[3] that the lines run by the United States surveyors along the top of the river banks are lines of boundary, that the properties of the adjoining landowners are limited by such mathematical lines, and, when these cannot be found, by the top of the bank, that being the great landmark. But more recent decisions[4] in America have, however, settled that such lines are not lines of boundary at all; that, notwithstanding such lines, the properties of the adjacent landowners extend as far as the edge of the water, thus giving them the benefit of river frontage and with it the right of access to the river, and the other incidents of riparian proprietorship as to accretion and the use of the water.

A system of survey and thak measurements and the so-called Dearah surveys, which have been held by Government in this country, and which in their method, though not in their object, are probably analogous to the surveys of the United States, may possibly give rise to a similar question here; and if it does occur, it will, I apprehend, have to be decided in the same way in which it has been done in America. The question was raised before the Privy Council in *Nogendra Chandra Ghose* v. *Mahomed Esoff*,[5] but their Lordships expressed no opinion upon it.

And under the like influence it laid the foundation in many states of doctrines with regard to ownership of the soil in navigable waters above tide-water, at variance with sound principles of public policy."

[1] *The Daniel Ball*, 10 Wall. 557, cited in Angell on Watercourses (7th ed.), § 543.

[2] *Infra*, Lect. VI.

[3] Houck on Navigable Rivers, §§ 250-260.

[4] *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Barney* v. *Keokuk*, 94 U. S. 324, cited in § 76 of Gould on Waters.

[5] 10 B. L. R., 406; 18 Suth. W. R., 113.

To return: It follows, of course, from what has been already stated that, in those states which have adopted the Common law doctrine in its entirety, the soil of the beds of rivers beyond the influence of the tide, belongs to the adjacent proprietors usque medium filum aquae; and that in those states where navigability in fact has been adopted as the test of navigability in law, the soil of the beds of rivers above the point where navigability ceases, likewise belongs to the adjacent proprietors usque medium filum aquae.

Ownership of the foreshore and banks—But the question to whom belongs the soil between high and low-water mark, is one upon which there has not been a concurrence of opinion in the courts of the different states. In those states where the Common law doctrine has been accepted, the soil of the foreshore has, of course, been held to belong to the state, and the lands of riparian proprietors, to terminate with the line of ordinary high-water mark. But of those states which have repudiated the Common law doctrine, some have adopted the rule that the rights of the adjacent proprietors extend up to the ordinary high-water mark; while others have laid down that such rights extend down to the ordinary low-water mark; the result being, that some states have reserved to themselves the right to the soil of the foreshore, while others have conceded that right to the adjacent landowners.[1]

Similar diversity of opinion has prevailed with regard to the ownership of the banks of navigable rivers above the flow and reflow of the tides. In some of the states, the right of the adjacent owners to the banks has been regarded as being so absolute and capable of such exclusive appropriation by them as to be entirely free from those servitudes in favour of the public that are incidental for the purposes of navigation; while in others, and these are apparently more numerous than the former, the banks, though regarded as being the private property of the adjacent owners, have yet been held to be subject to such servitudes.[2]

IV. **Classification of rivers according to Anglo-Indian law**—Lastly, I shall discuss the law of India regarding the topics I have just touched upon. Bengal Regulation, XI of 1825, which has force almost throughout India except the Presidencies of Madras and Bombay, was passed for the purpose of declaring the rules to be observed in determining claims to lands gained by alluvion or by dereliction of a river or the sea. Section 4, clause 3, enacts:—

"When a chur or island may be thrown up in a *large navigable* river

[1] *Supra*, 107, note 1. [2] *Ibid.*

(the bed of which is not the property of an individual), or in the sea, and the channel of the river, or sea, between such island and the shore may not be fordable, it shall, according to established usage, be at the disposal of Government &c."

And clause 4 of the same section provides:—

"In *small and shallow* rivers, the beds of which, with the julkur (or)[1] right of fishery, may have been heretofore recognised as the property of individuals, any sandbank, or chur, that may be thrown up, shall, as hitherto, belong to the proprietor of the bed of the river, &c."

It is evident from the language of these two clauses that, the Indian legislature, in declaring the rules for the determination of the ownership of churs or islands or sandbanks that might be formed or thrown up in rivers, classified or divided rivers according as they are 'large navigable rivers' or 'small and shallow rivers.' None of the several provisions of the Regulation make any mention of the presence or absence of the tide of the sea as in any way determining or affecting the rights of the Government or of private individuals to the beds of rivers or to alluvial or insular formations in them. Indeed, the expression 'tide' does not even occur in the Regulation.

It is to be observed also that, the expression 'small' in clause 4 has manifestly been used in contradistinction to the expression 'large' in clause 3; and that the expression 'shallow' in clause 4 has been used in contradistinction to the expression 'navigable' in clause 3. A river may be small and yet may be navigable; consequently, 'small' refers to the breadth of a river, and 'shallow' to its depth and presumably to its non-navigability.

Test of navigability.—A river has been held to be navigable when it allows of the passage of boats at all seasons of the year, although in the hot and cold seasons the water may not be very deep.[2]

Clause 3 of section 4, points to the further, though perhaps not conclusive, inference that the bed of a large and navigable river is primâ facie the property of Government, and that possibly it may also become the property of a private individual.[3] By parity of reasoning, the in-

[1] The word 'or' is evidently omitted by mistake. It is in Mr. J. H. Harrington's draft of Beng. Reg. XI of 1825: Markby's Lect. on Indian Law, 53.

[2] *Chunder Jaleah* v. *Ram Chunder Mookerjea*, 15 Suth. W. R., 212; *Mohiny Mohun Dass* v. *Khaja Ahsanoollah*, 17 Suth. W. R., 73, (a river cannot be considered as a "large navigable river" within the terms of the section, merely because it is unfordable).

[3] *Jugdish Chunder Biswas* v. *Chowdhry Zuhoorul Huq*, 24 Suth. W. R., 317; *Mohiny Mohun Dass* v. *Khajah Ahsanoollah*, 17 Suth. W. R., 73.

ference deducible from clause 4 of the same section, is that the ownership of the bed of a small and shallow river generally belongs to private individuals.

The language of section 5 of the Regulation also suggests the same conclusion by implication. It says :—

"Nothing in this Regulation shall be construed to justify any encroachments by individuals, on the beds or channels of navigable rivers &c."

If the beds of navigable rivers had been the property of private individuals, encroachments made by them upon such beds would not have been declared as unjustifiable.

Accordingly, the Privy Council, in *Doe* dem. *Seeb Kristo Banerjee and others* v. *The East India Co.*,[1] held that the East India Company, as representing the Indian Government, had a freehold in the beds of navigable rivers in India.[2] It may be noted, that though the river, in point of fact, was also tidal in the locality in question, yet that circumstance did in no way affect their Lordship's judgment.

Although, therefore, one should have expected that the rule was fully established, yet we find that in *Gureeb Hussein Chowdry* v. *Lamb*,[3] the Judges of the Calcutta Sudder Dewani Adawlat used expressions

[1] 6 Moo. Ind. App, 267; 10 Moo. P. C. C. 140.

[2] In *Nobin Kishore Roy* v. *Jogesh Pershad Gangooly*, (6 B. L. R. 343; 14 Suth. W. R., 352), Norman, J., states the proposition in a slightly different form: "So long as it,"—*i. e.*, the bed of a navigable river,—"is washed by the ordinary flow of the tide at a season when the river is not flooded, I think that it remains publici iuris, or, if vested in any one, that it is vested in the Crown; not under Regulation XI of 1825, and for mere fiscal purposes, but as representing, and as it were a 'trustee for the public.' That land in this condition is not subject to private rights of ownership is universally recognised, and it might be most detrimental to the interests of navigation if it were otherwise" The question raised in that case was as to the ownership of certain alluvial formations (in the bed of a tidal navigable river), which had not attained sufficient height so as to be above the level of the ordinary high-water mark.

But in *Lopez* v. *Muddun Mohun Thakoor*, (13 Moo. Ind. App, 467; 5 B. L. R., 521; 14 Suth. W R., (P. C.) 11,) the bed of a navigable river, where it is not the property of any private individual, has been described by the Privy Council as being 'public territory' or 'public domain.' In *Eckowrie Sing* v. *Hiralal Seal*, (12 Moo Ind. App., 136; 2 B. L. R., (P. C.) 4; 11 Suth. W. R, (P. C.) 2) the Privy Council at the commencement of their judgment, in stating the nature of the case before them said:—"This is a case of a claim to land washed away and reformed in the bed of *a navigable river, the ownership of which is not commonly in the riparian proprietors of its banks* and which is not proved in this case to have belonged to the predecessor in title of either disputant." The italics do not occur in the report.

[3] Calc. S. D. A. Rep. 1859, p. 1357.

in their judgment which seem to indicate that they intended to limit the right of the Government to the beds of navigable rivers as far as the tide ebbs and flows. The plaintiff in that case claimed an exclusive right of fishery in a portion of a navigable river (though that portion happened also to be tidal), as appurtenant to his permanently settled riparian estate, and the Court substantially held that the bed of a navigable river where the tide ebbs and flows, is primâ facie vested in the state and that the right of fishery therein belongs to the public. That this is the right interpretation of that decision, is borne out by the remarks of Glover, J., in *Chunder Jaleah and others* v. *Ram Churn Mokerjee and others*,[1] in which a claim was preferred by the plaintiffs as members of the public for the enforcement of their rights of fishery in a non-tidal navigable river, in which the defendants claimed to have an exclusive right of fishery as forming part and parcel of a permanently settled estate which they had purchased from Government. His Lordship dismissed the claim distinguishing the case from that of *Gureeb Hussein Chowdry and others* v. *Lamb*,[2] upon the ground that the latter related to a tidal river. He said:—"But in the first place, this case is not on all fours with the present. It had reference to the Megna, a large river in which the tide ebbs and flows regularly, and which fact had everything to do with the decision arrived at." The High Court in that case held that the ownership of the bed of the river which was navigable for boats, though situated far above the ebb and flow of the tide, primâ facie, belonged to Government and that it could grant an exclusive right of fishery in such waters to a private individual. Therefore, as regards the ownership of the bed of a river, this case goes further than *Gureeb Hussein Chowdry* v. *Lamb*,[3] because it extends the right of the Government to the beds of navigable rivers above the flux and reflux of the tide. Sir Michael Westropp in *Baban Mayacha* v. *Nagu Shravucha*,[4] after reviewing the above two cases as well as *Doe d. Seeb Kristo Banerjee* v. *The East India Co.*,[5] and *Bagram* v. *The Collector of Bhullooa*,[6] expressed himself in a way such as would raise the inference that, in his opinion, the

[1] 15 Suth. W. R., 212. Cf. *Bagram* v. *Collector of Bhullooa*, Suth. W. R., 1864, p. 243, (in which the right of Government to the beds of all navigable rivers, whether tidal or non-tidal was clearly acknowledged); *Collector of Rungpore* v. *Ramjadub Sen*, 2 Sev. 373; 1 R. C. & Cr. R 174.

[2] Calc. S. D. A. Rep. 1859, p. 1357.

[3] *Ibid.*

[4] I. L. R., 2 Bom.. 19.

[5] 6 Moo. Ind. App., 267.

[6] Suth. W. R., 1864, p. 243.

right of the Government to the beds of navigable rivers extends as far only as the tide ebbs and flows, and no further. However that may be, the question seems now to be concluded by the following observation of the Privy Council in the case of *Nogendro Chandra Ghose* v. *Mahomed Esoff*[1]—"The learned counsel did not contend for a distinction between a tidal river and a navigable river which has ceased to be tidal. Their Lordships have no reason to suppose that in India there is any such distinction as regards the proprietorship of the bed of the river."[2]

Ownership of the beds of non-navigable streams.—The beds of 'small and shallow' rivers or streams or of those portions of rivers which are above the point where navigability ceases, primâ facie belong to the riparian proprietors, ad medium filum aquae, *i. e.*, as far as the middle thread of the stream. But if the lands on both banks of such a stream belong to one and the same person, the presumption of law is, that he is the owner of the entire bed.

In *Bhageeruthee Debea and others* v. *Greesh Chunder Chowdhry*,[3] Norman, J., in delivering the judgment of the Court, after citing a previous case decided by the Sudder Dewany Adawlut of Calcutta in 1862,[4] said: "By the Common law of this country, the right to the soil of a river when flowing within the estates of different proprietors belongs to the riparian owners, ad medium filum aquae".[5] That this is the correct view of the law in this country upon the point in question seems to be corroborated by the observations of the Privy Council in *Kali Kissen Tagore* v. *Jodoo Lal Mullick*,[6] in which the plaintiff, respondent, who was the owner of some land on the bank of a tidal but non-navigable creek, complained that the erection by the defendant (whose land lay on the opposite bank) of a wall was an encroachment on the bed of the

[1] 10 B. L. R. 406; 18 Suth. W. R., 113.

[2] In *Lopez* v. *Madan Mohun Thakoor*, (13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 Suth. W. R., (P. C.) 11), the bed of the river Ganges at Bhaugulpore, and in *Mussamat Imam Bandi* v. *Hargobind Ghose*, (4 Moo. Ind. App. 403) the bed of the same river at Patna, was regarded by the Privy Council, as well as by all the Courts below, as 'public domain' or 'public territory,' though, as a matter of fact, the river is *not tidal* but only navigable at those places.

[3] 2 Hay, 541. It would appear from the statement of the facts of the case that the accretions formed in a navigable river, where the middle thread rule certainly does not apply.

[4] *Rajah Neelanund Sing and others* v. *Rajah Teknarain Singh*, Cal. S. D. A. Rep., 1862, p. 160.

[5] Cf. *Hunooman Dass* v. *Shama Churn Bhutta*, 1 Hay, 426. Contra, *Prosunno Coomar Tagore* v. *Kishen Choytunno Roy*, 5 Suth. W. R., 286.

[6] 5 Cal. L. R., 97.

stream and constituted an injury, for which he was entitled to have the wall demolished. It was found that the bed of the stream belonged to Government in right of its zemindari of 24-Pergannahs. Upon this state of facts the Privy Council observed :—"It appears that the plaintiff at all events has not all the rights of a riparian proprietor, or he would have been entitled to the bed of the stream ad medium filum." That is to say, that even according to the law in India, one of the rights of a riparian proprietor on a non-navigable stream is that, ordinarily, he is also the owner of its bed ad medium filum. The case further shows that, although this is the primâ facie presumption, yet it is capable of being rebutted, and that the bed may belong to neither ripariam proprietors but to a third person. Be that as it may, the rule above stated may be taken to be conclusively settled by the recent decision of the Privy Council in *Khagendra Narain Chowdhry* v. *Matangini Debi*,[1] in which the proprietors of estates situated on opposite banks of a watercourse (described in the judgment of the Court below as a 'sota' or an 'elbow or offset' of a river) brought cross-suits, each claiming against the other to be exclusively entitled to, and to be put into possession of, the whole of the watercourse flowing through their boundary. It was under attachment by Government under the provisions of the Criminal Procedure Code for the prevention of disputes occasioning a breach of the peace, and both parties had failed in their respective suits to make out exclusive title and possession in themselves. Under those circumstances the High Court of Calcutta was of opinion that both suits should be dismissed. But the Privy Council on appeal held that, as the evidence was sufficient to prove possession of the 'sota' between the two riparian owners, and that as Government was merely in the position of a stakeholder, advancing no proprietary claim thereto for itself, each of such owners was entitled to an equal moiety of the 'sota' opposite to and adjoining their respective estates.

It is perhaps needless to investigate at this day the foundation of the rule, which assigns to the riparian proprietors on each side the bed of a 'small and shallow' stream as far as the middle thread, because the elaborate system of survey and thak measurements held by Government in this country from time to time, have demarcated with almost scientific accuracy the boundary lines of estates belonging to private proprietors; and that although the beds of navigable rivers flowing between such

[1] L. R., 17 Ind. App. 62; I. L. R., 17 Cal. 814.

estates have generally been excluded from such measurements and reserved as public domain, the beds of 'small and shallow' streams have in some cases been wholly included within the ambit of one or other of the riparian estates; and in others, bisected by lines corresponding to the middle thread of the stream, so as to indicate the actual common boundary between them. It is possible, however, that the question may still in some (though indeed in very few) cases arise, as for instance where the evidence afforded by the records of such survey and thak measurements may not be forthcoming, or where the bed of such 'small and shallow' rivers may not have undergone such survey and thak measurements. In such cases, I apprehend, Courts of justice in this country will be inclined to adopt the sound rule laid down in the above cases, the more specially, as it is in unison with the law which prevails in most other countries.

It is also clear that if a 'small and shallow' river widens, in course of time, into a large navigable river by the irruption of the waters, the bed of such a river will still continue to be the property of the riparian proprietors, unless by their conduct they indicate an intention to abandon their right to it, in which case, of course, it will become a part of the public domain, and its ownership vest in Government. But if by alluvion on its banks or by gradual dereliction of a portion of its bed, a large navigable river contracts into a small and shallow stream, the right of the Government, will, as I shall explain more fully hereafter, continue to attach only to the diminished bed, and its right to the soil, which previously formed a part of the original bed of the river, will cease.

Ownership of the foreshore.—The law may be taken as perfectly settled in this country that the foreshore of a tidal navigable river belongs to Government.[1] Above the point where navigability ceases, its right to the bed of the river, and consequently its right to the foreshore (if the river happens to be tidal even above such point) ceases, such foreshore being thenceforward regarded as the property of the riparian proprietors.

Ownership of the banks of navigable rivers and the right of the public to tow thereupon.—In India, the banks of public navigable rivers are generally the property of the adjoining landowners, although they are

[1] *Doe* d. *Seeb Kristo Banerjee* v. *The East India Co.*, 6 Moo. Ind. App. 267; *Gangadhar Sirkar* v. *Kasi Nath Biswas*, 9 B. L. R., 128; *Gobindlall Seal* v. *The Secretary of State*, A. O. D. No. 32 of 1882; *Joy Krishna Mookerjee* v. *The Secretary of State*, A. O. D. No. 445 of 1885.

subject to a right of passage over by the public for the purposes of navigation.[1] Section 5 of Regulation XI of 1825, recognizes the existence of this public right, because it declares that "nothing in this Regulation shall prevent zillah and city magistrates or any other officers of Government who may be duly empowered for that purpose from removing obstacles which shall in any respect obstruct the passage of boats *by tracking on the banks of* such rivers or otherwise."[2] This does not, however, preclude riparian owners from imposing on boatmen a charge, called 'kuntagara,' for driving stanchions or pegs into the bank for the purpose of attaching their boats thereto.[3] It is an incident of the ownership of the bank, and it is not illegal or contrary to public policy to demand such a charge which is not of a compulsory character, because no boatman need make use of the bank in this manner save at his own option. But it seems yet reasonable, as has been ruled in America,[4] that notice of such a demand should be given before the bank is made use of in this manner.

Right of towage under Roman and French law.—The right of the public to use the banks of navigable rivers for the purpose of towing vessels was recognized by the Roman law. Any obstruction placed on a towpath was treated as an impediment to navigation, and a special Interdict was provided to prevent any interference with the free exercise of that right.[5]

The law of France follows the Roman law in this respect and declares that heritages abutting on navigable and 'flottables' rivers are subject to the servitude of a way along the bank in favour of the public for the towage of boats, rafts, and logs;[6] and it contains minute and detailed provisions for the setting out, use, and conservancy of different kinds of towpaths. Owners of heritages on the banks of a navigable or 'flottable' river are bound by the Ordonnance of 1669 (art. 7. tit. 28) to set apart a space of ten feet in breadth on each bank so long as towing is conducted by men;[7]

1 *Roop Lall Dass* v. *The Chairman of the Municipal Committee of Dacca*, 22 Suth. W. R., 276. *Cf.* Reg. XI of 1825, s. 5, which recognises the right of 'tracking on the banks' of navigable rivers for the towage of boats.

2 This power is now exercised under s. 133 of Act X of 1882.

3 *Dhunput Singh* v. *Denobundhu Shaha*, 9 Cal. L. R., 279.

4 *Supra*, 96.

5 Dig. xliii. 12. 1. 14. "Ait praetor: 'itorque navigii deterius fiat' . . . . . si pedestre iter impediatur, non ideo minus itor navigio deterius fit."

6 Code Civil, § 650.

7 Sirey, Les Codes Annotes, v. 1. § 650, note (nos. 1, 10.)

but where towing by horses is established, they are bound to leave a space of twenty-four feet in breadth, though on that bank only on which the practice of towing by such means actually exists.[1] Owners of heritages on the banks of a river 'flottable' for rafts only are bound by the Ordonnance of 1672 (art. 7. tit. 17) to set apart a space of four feet in breadth on the banks for the benefit of raftsmen.[2] The towpath, being a servitude merely for the benefit of navigation, may be used by navigators and fishermen alone,[3] who may stop anywhere along such way that the needs of navigation may require.[4] But they are not entitled to have any fixed place for landing along the towpath.[5] There are various other provisions besides, but they are too numerous to be stated at the close of a lecture.

[1] Sirey, Les Codes Annotes, v. 1, § 650, note (nos. 1, 10.)
[2] *Ibid.*, note (no. 8.)
[3] *Ibid.*, note (no 15.)
[4] *Ibid.*, note (no. 15 (2)).
[5] *Ibid.*

LECTURE V.

ALLUVION AND DILUVION.

(*Roman and French law.*)

Preliminary remarks—I. Under Roman law, alluvio &c. a branch of Accessio—Accessions caused by a river divisible into four kinds, *viz.*, (i) alluvio, (ii) avulsio, (iii) Insula nata, and (iv) alveus relictus—Alluvio—Reason for the accrual of ownership in alluvions—Right of alluvion restricted to ager arcifinius—Alluvion in ager limitatus belongs to first occupant or to the state—Right of alluvion not applicable to lakes and pools—Avulsio—Distinction between alluvio and avulsio—Insula in mari nata—Insula in flumine nata—Modes in which islands may be formed in a river—Ownership of islands formed in each of those several modes—Nature of such ownership—Apportionment of islands among competing frontagers—Ownership of accessions to an island by alluvion—Right by which ownership in an island is acquired—Ownership of the bed of a river, according to Vinnius—Ownership of islands formed in a public river, according to Grotius and Puffendorf—Ownership of a ford (vadum), according to them—Alveus relictus—Law laid down by Justinian—Opinion of Gaius as to the ownership of the bed abandoned by a river, when such bed had previously occupied the whole of a man's land—Reason for the accrual of right to the soil of the bed abandoned by a river, as stated by Vinnius—Vinnius' explanation of the reason for the distinction between the rule as stated by Gaius, and that laid down by Justinian—Rule deducible from the discussions by the commentators—Opinion of J. Voet with regard to the rule stated by Gaius—Inundatio—Law laid down by Justinian—Vinnius' comments on the same—Grotius' opinion as to the distinction drawn by the Roman jurists between an inundation withdrawing suddenly, and an inundation subsiding gradually—Right of a pledge-creditor, hypothecary-creditor, and usufructuary to alluvion—Imposition of additional tax or abatement thereof in respect of lands gained by alluvion or lost by diluvion respectively—II. Alluvion and diluvion according to French law—Alluvion and ownership thereof according to the Code Civil—Old French law with regard to such ownership—Ownership of lands gained by alluvion from the sea, or by dereliction thereof—Alluvion under different circumstances and their essential requisities—Ownership of alluvions formed along a public road—Right of alluvion not applicable to increments annexed to the banks of torrents—State canalizing a stream cannot remove alluvions without offering indemnity to riparian owners—Right of usufructuaries, legatees, secured creditors &c., to alluvions—Right of a vendee to alluvion—Right of a farmer and an emphyteuta to alluvion—Dereliction of the bed of a river and the ownership of such bed—Legal effect of inundation on ownership—Right of alluvion not applicable to lakes and ponds—Avulsion—Ownership of islands formed in the beds of rivers or streams, navigable or 'flottables'—Ownership of islands formed in the beds of streams neither navigable nor 'flottables'—Ownership of abandoned river-beds—Anomaly resulting from a difference in the provisions with regard to partial and total dereliction.

The rules of law, which regulate the ownership of the bed and foreshore of the sea, and the beds and banks of rivers, form an indispensable preliminary to the law of alluvion and diluvion. Having in the three preceding lectures ascertained, among other things, who are to be deemed proprietors in each of these several cases, and what the nature of such ownership is, we are now in a position to enquire and determine how such ownership is affected, altered or modified by reason of changes taking place, by the action of water, in the bed and foreshore of the sea as well as in the channels and banks of rivers. These changes generally lead to, or are concomitant with, the deposition and annexation of soil and sand on and to the foreshore of the sea, or the banks of rivers; the disruption and disseverance of soil from such foreshore or banks; the dereliction of the bed of the sea or of rivers; or the formation of islands in the bed of the sea or rivers. The consideration of the various rules of law which regulate the ownership of such alluvial and insular formations, or of the bed abandoned by the sea or a river shall form the subject of the present as well as of some of the succeeding lectures.

The earliest trace of a perception of these rules is indeed discoverable in the deliverances of a Brahminical sage[1] of vast antiquity, but compared with the product of a highly matured and nearly finished legal system of a comparatively later, yet remote, age, the conception, such as it was, appears to be so rudimentary and indistinct as to be undeserving of interest to any one except to the legal antiquarian. The jurisprudence of the Roman Empire has furnished to the world the type and pattern of a body of rules upon the various branches of the law of alluvion, so singularly perfect in its general feature, and so decidedly complete in all its important details, that the collective wisdom of succeeding centuries, in reproducing these rules, with one notable exception, in the legal systems of modern states, has failed to suggest any positive improvement in their form or substance.

Classification under Roman law of accessions caused by a river.—In the Institutes of Justinian, remarkable for the excellence of its method, if not for the strict logicality of its classifications, these rules are treated under the head of Accessio, which is one of the modes of acquisition of ownership. It is a generic name given by the Roman jurists to that natural mode of acquisition of ownership, by which the owner of the principal object becomes, by virtue of such ownership alone, owner

[1] Vrihaspati.

also of the accessory. Accessio est modus adquirendi iure gentium quo vi et potestate rei nostrae aliam adquirimus.[1] It embraces not merely the rules for the acquisition of ownership in land added by the natural action of a river, but also those for the acquisition of ownership in accessions or additions made to one's property, whether moveable or immoveable, by human agency or skill. The accessions made to one's land by changes in the bed of the sea being of extremely rare occurrence are slightly touched upon by the Roman lawyers. Accessions caused by the natural action of a river are divided by them into four distinct heads[2]:—

(i) That which is imperceptibly added to land by a river by Alluvio, *i. e.*, alluvion. (The term also sometimes denotes the increment so added.)

(ii) That which being detached from the land of one person by the open violence of a river, becomes afterwards united with the land of another. This process is called Avulsio, or avulsion, (which sometimes is also applied to the increment added in this mode).

(iii) Island springing up in a river, called Insula nata.

(iv) Bed abandoned by a river, called Alveus relictus.

I. **Alluvio.**—With regard to Alluvio, the first of these four modes, the law is thus laid down in the Institutes of Justinian:—

"Moreover, soil which a river has added to your land by alluvion becomes yours by the law of nations. Alluvion is an imperceptible addition (est autem alluvio incrementum latens), and that which is added so gradually that you cannot perceive the exact increase from one moment of time to another, is added by alluvion."[3]

This passage has, with slight verbal alterations, been taken from an excerpt from Gaius[4] contained in the Digest.

1 Heineccius, Recit. Iur, §

2 Atque hoc modo quatuor rerum genera nobis acquiruntur; quae latenter per alluvionem a flumine agris nostris adiciuntur; quae aperta vi fluminis de aliono avulsa cum praedio nostro unita sunt; insula in flumine nata; alveus a flumine relictus. Vinnius. Comm. ad Inst. lib. ii. t. 1. text. De alluvione.

3 2 Moyle, Imp. Iust. Inst, 39. Praeterea quod per alluvionem agro tuo flumen adiecit, iure gentium tibi adquiritur. est autem alluvio incrementum latens. per alluvionem autem id videtur adici, quod ita paulatim adicitur, ut intellegere non possis, quantum quoquo momento temporis adiciatur. Inst. ii. 1. 20. *Cf.* Gaius, Inst. ii. 70 ('quod ita paulatim adicitur ut oculos nostros fallat.'). *Cf.* Cod. vii. 41. 1; J. Voet, Comm. ad Pand. lib. xli. t. 1. § 15.

4 Dig xli 1. 7 1.

Foundation of the right of alluvion.—"Alluvion is said to be incrementum latens, *i. e.*, an imperceptible addition, when any thing is so gradually and secretly added to our land that one cannot perceive by his senses the quantity which at each moment of time is detached from the land of another person and added to ours. It is out of this (circumstance) that the equity of this acquisition arises; assuredly, because what is added by alluvion is so slowly and secretly detached from (another's land), that if perchance its restitution were thought of, one would be unable to make out whose it was before or from what it had been detached."[1]

Right of alluvion, where applicable and where not.—The right of alluvion exists in respect of ager arcifinius, that is, 'arcifinious' lands, alone. It does not exist in respect of ager limitatus or limited lands, for, "it is well-established," says Florentinus, "that in limited lands the right of alluvion does not exist."[2] The distinction between 'arcifinious' and limited lands, as it obtained in the Roman law, has been already pointed out.[3] The increments added to limited lands by a river belong to the state, because the grants of such lands being comprised within certain fixed and determinate limits, the grantees thereof are not entitled to claim any land beyond such limits.[4] It may be observed, however, that there is a passage in the Digest which lays down, that such accessions are to be deemed as res nullius to which the first occupant may acquire a title.[5]

The right of alluvion does not also exist in respect of lakes (lacûs) and pools (stagna). "Lakes and pools," says Callistratus, "although they sometimes increase and sometimes dry up, yet retain their boundaries and

[1] Alluvionem dicit esse incrementum latens, cum quid ita paulatim et obscure praedio nostro adicitur, ut sensu percipi non possit, quantum quoque temporis momento alterius praedio detrahatur, et adiciatur nostro, ... Ex quo crescit huius acquisitionis aequitas: nimirum quod quae alluvione accedunt, ita lente et obscure detrahantur, ut intellegi non possit, si forte de his restituendis quaeratur, quorum prius fuerit, aut quibus detracta. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De alluvione. *Cf.* Grotius, de Iur. Bell. et Pac. lib. ii. c. 8, § 11.; Frontinus, de Controv. Agr. 50.

[2] In agris limitatis ius alluvionis locum non habere constat. Dig. xli. 1. 16. *Cf.* Dig. xliii. 12. 1. 6.; Vinnius, Comm. ad. Inst. lib. ii. t. 1. text. De alluvione; Heineccius, Recit. Iur. § 358.

[3] *Supra*, 100.

[4] Grotius, de Iur. Bell. et Pac. lib. ii. c. 8. § 12; J. Voet, Comm. ad Pand. lib. xli. t. 1. § 15.

[5] Dig. xliii. 12. l. 6.

therefore in them the right of alluvion is not recognized."[1] Vinnius states that the expression 'river' (flumen) is used in the passage relating to alluvio which I last cited from the Institutes, "to contradistinguish it from lakes and pools, with regard to which the right of alluvion is not recognized; for rivers alone have natural flow and motion, in consequence of which they frequently change their banks and limits; so that they and they alone admit of alluvion."[2]

II. **Avulsio.**—With regard to Avulsio, or Appulsio, which is the second mode of accession already mentioned, Justinian in his Institutes thus states the law:—

"If, however, the violence of the stream sweeps away a parcel of your land and carries it down to the land of your neighbour, it clearly remains yours; though, of course, if, in process of time, it becomes firmly attached to your neighbour's land, and the trees which it carried with it strike root in the latter, they are deemed from that time to have become part and parcel thereof."[3]

This passage too has been taken from Gaius.[4] J. Voet in his commentary on the Pandects, describes this kind of accession as 'incrementum patens et conspicuum.'[5]

This mode of accession differs not a little from the foregoing, *i. e.*, alluvion, because in the case of avulsion, our right to the parcel of land detached from the land of another person by the violence of a river and added to our land does not accrue, as it does in the case of land imper-

1 Lacus et stagna licet interdum crescant, interdum exarescant, suos tamen terminos retinent ideoque in his ius alluvionis non adgnoscitur. Dig. xli. 1. 12 pr. *Cf.* Dig. xxxix. 3. 24. 3, ('Lacus cum aut crescerent aut decrescerent, numquam neque accessionem neque decessionem in eos vicinis facere licet').

2 Ad differentiam lacuum et stagnorum, in quibus ius alluvionis non agnoscitur. Etenim ut sola flumina fluxum et motum naturalem habent, quo fit, ut ripas suas et terminos saepe mutent; ita et sola alluvionem admittunt. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De alluvione.

3 2 Moyle, Imp. Just. Inst., 39-40. Quodsi vis fluminis partem aliquam ex tuo praedio detraxerit et vicini praedio appulerit, palam est eam tuam permanere. plane si longiore tempore fundo vicini haeserit arboresque, quas secum traxerit, in eum fundum radices egerint, ex eo tempore videntur vicini fundo adquisitae esse. Inst. ii. 1. 21.

Avulsion is a phenomenon of rare occurrence. It is related, however, that such violent mountain torrents, as the Nile and the rivers of North Italy, especially the Po, sometimes produce such a change. Roby, Introd. to the Study of Justinian's Digest, 72, s. v. alluvionis.

4 Dig. xli. 1. 7. 2; xii. 1. 4. 2, (Ulpian). *Cf.* Gaius, Inst. ii. 71.

5 Voet, Comm. ad Pand. lib. xli. t. 1. § 16.

ceptibly added by alluvion, the moment such adherence takes place, but only after it has coalesced with, and become firmly rivetted to, our land; for until such coalescence takes place, the portion detached retains its original form and entity, and therefore the right to that parcel of land continues in him to whom it formerly belonged. As Vinnius expresses it, 'the river is only a partial and remote cause of this mode of acquisition, the proximate and most potent cause is coalescence.'[1]

Vinnius thinks that it is not essential to this mode of acquisition that the parcel detached should have brought trees with it, and that they should strike root in the land to which it is carried; for the right in such a case, according to him, accrues from the mere fact of coalescence, and the circumstance that the trees have struck root in the land to which the portion so carried adheres, in the particular case where such detached parcel may have carried trees with it, merely furnishes the most conclusive proof of such coalescence.[2]

III. **Insula nata.**—As regards Insula nata, the third species of accession, the law is thus stated by Justinian:—

(*a*) As to an island rising in the sea, insula in mari nata, it is said that:—

"When an island rises in the sea, though this rarely happens, it belongs to the first occupant, for until occupied, it is held to belong to no one."[3]

(*b*) With regard to an island arising in a river, insula in flumine nata, the law is thus enunciated:—

"If, however, (as often occurs) an island rises in a river, and it lies in the middle of the stream, it belongs in common to the landowners on either bank, in proportion to the extent of their lands as measured along the bank; but if it lies nearer to one bank than to the other, it belongs

[1] Haec a superiore illa multum differt. Nam si pars terrae integra a vicino agro vi fluminis avulsa sit, et nostro praedio adiecta; ea non statim nobis acquiritur, ut aquiruntur, quae latenter flumen adicit per alluvionem, sed quamdiu nondum coaluit, et unitatem cum terra mea fecit, manet eius, cuius ante fuit: quia manet eadem species seu idem individuum, ut loquuntur, aut ut clarius loquar et nostro more, quia cum nondum coaluit, partem praedii mei non facit, ut ei cedere debeat. Ubi verò coaluit, et tamquam trabali clavo agro meo affixa est; iam ut pars fundo meo cedat necesse est, et mihi iure accessionis acquiritur. Huius igitur acquisitionis flumen ex parte tantum causa est, et remotior: proxima et potissima coalitio. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De vi fluminis.

[2] Vinnius, Comm. ad Inst. lib ii. t. 1. text. De vi fluminis.

[3] 2 Moyle, Imp. Just. Inst. 40. Insula, quae in mari nata est, quod raro accidit, occupantis fit: nullius enim esse creditur. Inst. ii 1. 22.; Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Insula; Heineccius, Recit. Iur. § 357.

to the landowners on that bank only. If a river divides into two channels, and by uniting again, these channels transform a man's land into an island, the ownership of that land is in no way altered."[1]

This passage also has been taken from Gaius.[2]

Modes in which islands may be formed.—"There are three modes," says Pomponius, "in which an island is formed in a river:—

First,—When the river flows round land which used not to be part of its bed;

Second,—When it leaves dry a place which used to be a part of its bed and begins to flow on either side of it;

Third,—When by the gradual deposit it has made, a spot emerges above its bed, and has increased it by alluvion.

In the last two modes, an island is formed which becomes the private property of him, who at the time of its first appearance was owner of the nearest land: for the nature of a river is such that when its course is changed, it changes also the character of its bed. Nor does it matter whether our enquiry is about a mere change of the soil of the bed, or about something deposited on that soil and ground; for both are of the same kind. But in the mode first mentioned the character of the ownership is not changed."[3]

"Let us consider," says Paulus, "whether this is not incorrect with regard to an island which does not adhere to the bed itself of the stream, but by rushes or some other light material is supported in the stream, so that it does not touch its bottom, and is moveable; for such an island is almost public and part of the river itself.[4]

1 At in flumine nata, quod frequenter accidit, si quidem mediam partem fluminis teneat, communis est eorum, qui ab utraque parte fluminis prope ripam praedia possident, pro modo latitudinis cuiusque fundi, quae latitudo prope ripam sit. quodsi alteri parti proximior sit, eorum est tantum, quia ab ea parte prope ripam praedia possident. quodsi aliqua parte divisum flumen, deinde infra unitum agrum alicuius in forman insulae redegerit, eiusdem permanet is ager, cuius et fuerat. Inst. ii. 1. 22. *Cf.* Gaius, Inst. ii. 72.

2 See excerpt from Gaius, Dig. xli. 1. 7. 3.

3 Tribus modis insula in flumine fit, uno, cum agrum, qui alvei non fuit, amnis circumfluit, altero, cum locum, qui alvei esset, siccum relinquit et circumfluere coepit, tertio, cum paulatim colluendo locum eminentem supra alveum fecit et eum alluendo auxit. duobus posterioribus modis privata insula fit eius, cuius ager proprior fuerit, cum primum extitit: nam et natura fluminis haec est, ut cursu suo mutato alvei causam mutet. nec quicquam intersit, utrum de alvei dumtaxat solo mutato an de eo, quod superfusum solo et terrae sit, quaeratur, utrumque enim eiusdem generis est. primo autem illo modo causa proprietatis non mutatur. Dig. xli. 1. 30. 2.

4 Paulus: videamus ne hoc falsum sit de ea insula, quae non ipsi alveo fluminis cohaeret

It is therefore clear from the above texts that, if the island is a floating island, or if it is formed by the river encircling the land of a private individual, its proprietorship is in no way altered. In the latter case, it remains the property of the person whose land is thus transformed into an island; in the former, it is considered as a part of the river itself and its proprietorship therefore remains in the public.

Topics concerning islands discussed by Vinnius.—With respect to an island formed in the other two modes mentioned by Pomponius in the text I have just quoted, three questions, according to Vinnius, usually arise, *viz.* :—[1]

1. By whom is it acquired?

2. To what extent is it acquired, that is to say, what is the nature of the interest which is acquired in it?

3. By what right or according to what legal principle is ownership acquired in it?

(1) As regards the first question, it is clear from the text of Justinian[2] that the island does not belong to the public but to the owners of lands on either bank opposite to such island. This is also the opinion of Pomponius as I have just pointed out, as well as of Ulpian as appears from the following text:—

"If an island rises in a public river, it is asked, what shall become of it? It does not appear to belong to the public; for it belongs to the first occupant, if the lands be limited lands, or to him whose bank it touches, or, if it rises in the middle of the river, to both the riparian proprietors."[3]

This position is further confirmed by the reasoning of Paulus and Proculus contained in the texts[4] to which I shall presently refer.

It is also evident from this text of Ulpian that when an island rises in a river flowing through ager limitatus or limited land, it belongs to the first occupant.

sed virgultis aut alia qualibet levi materia ita sustinetur in flumine, ut solum eius non tangat, atque ipsa movetur: haec enim propemodum publica atque ipsius fluminis est insula. Dig. xli. 1. 65. 2.

[1] Tria fere sunt, quae de acquisitione insulae in flumine nascentis quaeri possunt; cui, quatenus, et quo iure, seu qua iuris ratione acquiratur. Vinnius, Comm. ad Inst. lib. ii. t. 1., text. De Insula.

[2] *Supra*, 123.

[3] Si insula in publico flumine fuerit nata inque ea aliquid fiat, non videtur in publico fieri. illa enim insula aut occupantis est, si limitati agri fuerunt, aut eius cuius ripam contingit, aut, si in medio alveo nata est, eorum est qui prope utrasque ripas possident. Dig. xliii. 12. 1. 6.

[4] Dig. xli. 1. 29, 56; *infra*, 127, 128.

(2) The second question subdivides itself into two branches :—

(*a*) Whether such riparian owners are entitled to the bare ownership of the island or also to every use of it of which it may be capable?

(*b*) Whether the island belongs to each of the adjacent riparian proprietors in severalty, or whether it belongs to all of them pro indiviso or in common?

As to (*a*), Vinnius comes to the conclusion that if an island rises in a public river, the proprietors of adjacent lands, when such lands admit of the right of alluvion,[1] are entitled not merely to the bare ownership but also to every use of it; and that therefore they are entitled to sow corn and plant trees in its soil and enjoy their fruits; if they do anything on it (*i. e.*, the island) or drive anything into it, that is not considered as done in a public place or on the bank.[2]

As to (*b*), Vinnius in his commentary observes that, if the island rises in the middle of the river, it belongs in common to those who possess lands on either bank: if, however, it rises wholly on either side of the middle line of the river, and lies in front of the land of a single person, such land being nearer to it than any other, it belongs exclusively to the owner of that land; but if it lies in front of the lands of several persons, it belongs in common to those who possess the adjacent bank, as far as such island extends. He then goes on to say that, by this community of interest it is not to be understood that it belongs to them pro indiviso, in which sense the expression is more aptly used; but that it belongs to them in distinct parcels according to the extent of frontage of each riparian proprietor, so that each riparian proprietor shall have that parcel opposite to his frontage which is contained within lines drawn at right angles across the island from the extremities of his frontage.[3] He then refers to the following text of Paulus in support of his position:—

[1] *i. e.* when the land is 'arcifinious' and not limited.

[2] Ad primam quod attinet, sic omnino habendum, insulam in flumine publico natam, si vicina praedia alluvionis ius habent, non proprietate tantum, verum usu etiam dominis vicinorum praediorum acquiri, ideoque eos solos sementem in ea facere, arbores plantare, fructus ibi natos percipere posse: nec si quid aliud in ea faciant, aut quid in eam immittant, id in publico aut in ripa fieri intellegi. Vinnius, Comm. ad Inst. lib. ii. t. 1, text. De Insula.

[3] Et siquidem in medio fluminis alveo enata sit, communis fit eorum, qui prope utramque ripam possident: sin cis, aut ultra medium amnem, siquidem contra frontem unius praedii, cui proprior est, tota acquiritur huius praedii domino; sin ita ut fronti plurium agrorum sit opposita, communis fit omnium, qui secundum eam ripam, in quantum insula porrigitur, habent, *hoc* § et *d. l.* 7. § 3. *eod.* Communem autem fieri insulam cùm dicimus, non intellegimus, eam communem fieri pro indiviso uti solemus, cùm proprìè loquimur *l.* 5. *de stip. ser.*

Apportionment of islands amongst competing frontagers.—"An island which has risen in a river is not the undivided common property of those who have lands on one of the banks, but is theirs in separate shares; for each of them will hold of it in severalty so much as lies in front of his bank, a line being, as it were, drawn across the island at right angles."[1]

It follows as a corollary from the rule laid down by Paulus that,—"If an island has formed and become an accession to (a portion of) my land, and I sell the lower portion in front of which the island does not lie, no part of that island will belong to the purchaser, for the same reason for which it would not have been his originally, if he had been owner of that same portion at the time when the island rose."[2]

The rule as stated by Justinian in the text which I have already quoted,[3] *viz.*—"but if it" (*i. e.*, the island) "lies nearer to one bank than to the other, it belongs to the landowners on that bank only," is apparently defective, inasmuch as the island may rise in the middle of the river and may yet be nearer to one bank than to the other, in which case, of course, the island will belong to the landowners on both banks, and not merely to the landowners on the bank nearer to the island, the central line of the river being the dividing boundary between the portions of the island to which the owners of lands on the two banks will be respectively entitled.[4]

Apportionment of a second island rising between the first and the opposite mainland.—If an island rises in a river so that it belongs wholly to the owner on one side of the bank and then another island rises between that island and the opposite bank, how is the ownership of this new island

l. 5. § *ult. de reb. eor. qui sub tut.* sed regionibus divisis pro fronte, hoc est, latitudine cuiusque fundi, quae prope ripam sit; ut tantum quisque in ea habeat certis regionibus, quantum ante cuiusque eorum ripam esse linea in directum per insulam transducta apparebit. Vinnius, Comm. ad Inst. lib ii. t. 1. text. De insula.

[1] Inter eos, qui secundum unam ripam praedia habent, insula in flumine nata non pro indiviso communis fit, sed regionibus quoque divisis: quantum enim ante cuiusque eorum ripam est, tantum, veluti linea in directum per insulam transducta, quisque eorum in ea habebit certis regionibus. Dig. xli. 1. 29.

[2] [Ergo] si insula nata adcreverit fundo meo et inferiorem partem fundi vendidero, ad cuius frontem insula non respicit, nihil ex ea insula pertinebit ad emptorem eadem ex causa, qua nec ab initio quidem eius fierit, si iam tunc, cum insula nasceretur, eiusdem partis dominus fuisset. Dig. xli. 1. 30 pr.

[3] *Supra*, 123.

[4] 1 Moyle, Imp. Iust. Inst. 191, § 22 (note).

to be determined? Paulus declares that it should be determined by an imaginary line drawn through the middle of the channel between the old island and the opposite bank, and not by a line drawn through the middle of the channel as it stood between the old banks before any island rose in the river.[1] "For what does it matter," says Paulus, "what the character of the land is by reason of proximity to which the question as to the ownership of the second island is settled?"

Ownership of increments annexed to islands.—An important rule with regard to the ownership of increments added to an island is the following laid down by Proculus:—

"An island rose in a stream in front of my land, in such wise that its length did not extend beyond the limit of my land; afterwards it gradually increased and stretched in front of the lands of my upper and lower (riparian) neighbours: I ask whether the increment is mine on account of its being an adjunct to what is mine, or whether it is his to whom it would have belonged, if originally when the island rose it had been of that length. Proculus replied: if the law of alluvion applies to that river[2] in which you have stated that an island rose in front of your land in such wise that it did not exceed the length (frontage) of your land, and if the island was originally nearer to your land than to that of the proprietor on the opposite side of the river; then the whole of it became yours, and that which was subsequently added to the island by alluvion is yours, even though the addition took place in such a manner that the island extended opposite to the frontages of (your) upper and lower (riparian) neighbours, or that it (the island) approached nearer to the land of the proprietor across the river."[3]

[1] Si insula in flumine nata tua fuerit, deinde inter eam insulam et contrariam ripam alia insula nata fuerit, mensura eo nomine erit instruenda a tua insula, non ab agro tuo, propter quem ea insula tua facta fuerit: nam quid interest, qualis ager sit, cuius propter propinquitatem posterior insula cuius sit quaeratur? Dig. xli. 1. 65. 3, (Paulus).

[2] *i. e.*, if the river runs through agri arcifinii, and not through agri limitati.

[3] Insula est enata in flumine contra frontem agri mei, ita ut nihil excederet longitudo regionem praedii mei: postea aucta est paulatim et processit contra frontes et superioris vicini et inferioris: quaero, quod adcrevit utrum meum sit, quoniam meo adiunctum est, an eius iuris sit, cuius esset, si initio ea nata eius longitudinis fuisset. Proculus respondit: flumen istud, in quo insulam contra frontem agri tui enatam esse scripsisti ita, ut non excederet longitudinem agri tui, si alluvionis ius habet et insula initio propior fundo tuo fuit quam eius, qui trans flumen habebat, tota tua facta est, et quod postea ei insulae alluvione accessit, id tuum est, etiamsi ita accessit, ut procederet insula contra frontes vicinorum superioris atque inferioris, vel etiam ut propior esset fundo eius, qui trans flumen habet. Dig. xli. 1. 56 pr.

Ownership of an island not affected by the main channel subsequently flowing between it and the nearer bank.—A further question discussed by Proculus regarding the ownership of islands is as follows:—"I also ask, if the island has risen nearer to my bank and afterwards the whole river forsaking the larger channel begins to flow between my land and the island, have you any doubt that the island still continues to be mine, and a portion of the soil of the bed relinquished by the river is also mine? I beg you, write to me what you think. Proculus replied: if the island was originally nearer to your land, and the river forsaking its larger channel, which lay between that island and the land of your neighbour on the opposite side of the river, began to flow between the island and your land, the island still remains yours. And the bed, which used to be between that island and your neighbour's land, ought to be divided in the middle, so that the part nearer to your island is to be considered yours and the part nearer to the land of your (opposite) neighbour his. I understand that when the bed of the river on either side of the island dried up, it ceased to be an island, but in order that the case may be more intelligible, they call the land an island which used to be an island."[1]

(3). With regard to the third question, namely, by what right or according to what principle of law, ownership of the island is acquired, Vinnius holds that it is acquired by right of accession, and not by right of occupancy (occupatio). He observes: "I think there is no other ground for this acquisition than that the island is a part of the bed, and that the bed is considered as a part of the adjoining land; as in the case, where the whole bed is discovered (by water), it is acquired by the adjoining landowners, so too when a portion of it is discovered, that is to say, when an island rises in it, it is also acquired by them, clearly by right of accession. That the island is a

[1] Item quaero, si, cum propior ripae meae enata est insula et postea totum flumen fluere inter me et insulam coepit relicto suo alveo, quo maior amnis fluerat, numquid dubites, quin etiam insula mea maneat et nihilo minus eius soli, quod flumen reliquit, pars fiat mea? rogo, quid sentias scribas mihi. Proculus respondit: si, cum propior fundo tuo initio fuisset insula, flumen relicto alveo maiore, qui inter eam insulam fuerat et eum fundum vicini, qui trans flumen erat, fluere coepit inter eam insulam et fundum tuum, nihilo minus insula tua manet. et alveus, qui fuit inter eam insulam et fundum vicini, medius dividi debet, ita ut pars propior insulae tuae tua, pars autem propior agro vicini eius esse intellegatur. intellego, ut et cum ex altera parte insulae alveus fluminis exaruerit, desisse insulam esse, sed quo facilius res intellegeretur, agrum, qui insula fuerat, insulam appellant. Dig. xli. 1. 56. 1.

part of the bed is unquestionable. It may be objected however that, what we have said as to the bed being a part of the adjoining land, is not quite consistent, since the bed is declared public by the same law according to which the river itself is public, (Dig. xliii. 12. 1. 7); that, therefore, it should rather be held on the contrary, that the island, which is a part of the bed, ought also to be public. But it is clear that the bed is not public absolutely, but only so long as it is covered by the river; the public make use of it by means of the river, and when it is discovered by the river, it becomes the private property of the adjoining landowners. It makes no difference,—as Pomponius, anticipating that such an objection might be raised, replied,—whether our enquiry is about a change of the soil of the bed, or about something deposited over that soil and ground, that is, whether our enquiry relates to a change of the whole bed and desertion by the river, or to an island rising in it, for it is enough (for our purpose) that the portion of the bed in which the island rose is no longer covered by the river. Nor indeed does the fact that the river flows between prevent the island from being united with and annexed to the adjoining lands on the bank by means of the bed, any more than the public road, which lies between the bed and the adjacent lands, prevents the bed, when dry, from being acquired by those who possess property along the road, (Dig. xli. 1. 38). For, as the public road is considered a part of the adjoining land (Dig. xli. 1. 38, in fin.), so also is the intervening bed subjacent to the river.[1]

[1] Ego non aliam huius acquisitionis rationem esse arbitror, quam quod insula alvei pars sit, alveus pars conseatur vicinorum praediorum; ac proinde ut alveus totus nudatus vicinus acquiritur, ita et partem eius nudatam, id est, insulam in eo natam iisdem acquiri, iure scilicet accessionis. Et insulam quidem partem alvei esse constat. At absonum videri potest, quod alveum partem esse dicimus vicinorum praediorum, cum alveus publicus sit eodem iure, quo ipsum flumen, l. 1. § *simile* 7. *de flum.* § *seq. inf. hoc tit.* ut contra potius dicendum videatur, insulam quoque, quae alvei pars est, publicam fieri oportere. Sed sciendum est, alveum non simpliciter publicum esse, sed quatenus a flumine tenetur, eoque per flumen populus utitur, nudatum flumine privatum fieri vicinorum: nihil autem interesse, ut Pomponius huic objectioni occurens respondet, utrum de alvei solo mutato, an de eo, quod superfusum solo et terrae sit, quaeratur, hoc est, utrum quaeratur de toto alveo mutato et a flumine relicto, an de insula in alveo nata; quippe sufficere, ea parte, qua insula extitit, alveum a flumine non teneri, *d. l. ergo* 30 § 1 *et* 2. Neque vero flumen interfluens impedit, quominus insula vicinis ripae agris per alveum jungatur atque accedat, non magis quam via publica inter alveum et vicina praedia interjecta impedit, quominus alveus siccatus acquiratur his, qui secundum eam viam possident, *l. Attius* 38. *eod.* Etenim ut via publica pars praedii vicini existimatur, *d. l. Attius* 38. *in fin.* ita et alveus intermedius flumini subjectus. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Insula.

Grotius' theory as to ownership of islands formed in a public river.—With regard to the ownership of islands formed in a public river, Grotius and Puffendorf maintain that if an island rises in a river which, when the body of the people took possession of the whole extent of a country, was not included in the lands that were parcelled out among private individuals, it should belong to the public in the same manner in which an island, formed in a river belonging to a private person, or the channel of such a river when it is left dry, belongs to him.[1]

But, then, if an island formed in a public river belongs to the public, and the alluvion annexed to the banks, to private individuals, the question arises who should be deemed owner of that narrow elevated space of ground (vadum) between the island and the adjacent bank, which has not attained sufficient height so as to emerge above the surface of the water? Grotius thinks that if the passage over such space generally be by boat, it should be considered as part of the island.[2]

IV.—**Alveus relictus.**—The fourth mode of acquisition by right of accession takes place when the river abandons its bed and begins to flow through another channel.

With regard to this, Justinian declares the law thus :—

" But if a river entirely leaves its old bed, and begins to run in a new one, the old bed belongs to the landowners on either side of it in proportion to the extent of each owner's lands as measured along the bank, while the new one acquires the same legal character as the river itself, and becomes public. But if after a while the river returns to its old bed, the new bed again becomes the property of those who possess the land along its banks."[3]

[1] Grotius, de Iur. Bell. et Pac. lib. ii. c. 8. § 9 (1). Puffendorf, de Iur. Nat. et Gent. lib. iv. c. 7. § 12.

[2] Grotius, de Iur. Bell. et Pac. lib. ii. c. 8. § 14. Grotius mentions that with regard to this, there are different customs in the different provinces of Holland; in Gelderland, if a loaded cart can pass over the submerged space between the bank and the island it belongs to the owner of the adjacent estate, provided he takes possession of it; and in the district of Putte it belongs to the adjacent owner if a man on foot can with his sword's point touch such submerged space.

[3] 2 Moyle, Imp. Iust. Inst. 40. Quodsi naturali alveo in universum derelicto alia parte fluere coeperit, prior quidem alveus eorum est, qui prope ripam eius praedia possident, pro modo scilicet latitudinis cuiusque agri, quae latitudo prope ripam sit, novus autem alveus eius iuris esse incipit, cuius et ipsum flumen, id est publicus. quodsi post aliquod tempus ad priorem alveum reversum fuerit flumen, rursus novus alveus eorum esse incipit, qui prope ripam eius praedia possident. Inst. ii. 1. 23.

This also is taken from Gaius with slight verbal alterations, but as a portion of the text of Gaius has been left out by Justinian, it may be worth while to refer to it now. It runs thus:—

"When, however, the new bed has occupied the whole of a man's land, though the river shall have returned to its former bed, yet he to whom the land belonged cannot in strictness of law, have any right to that (deserted) bed, because the land which was (before) his, has ceased to be his, through its having lost its proper form, and also because not having any neighbouring land, he cannot take any portion of that bed by reason of vicinage, but it is scarcely possible that (in equity) this rule should prevail. 'sed vix est, ut id optineat.'"[1]

Vinnius, after citing the text of Pomponius[2] to which I referred in my last lecture, and after discussing several grounds of objection, comes to the conclusion that the reason upon which this right is founded is that, the bed of a river is part of the adjacent land, just as if it had on some former occasion been detached from the latter, though subject to the use of the public, and that therefore when the river dries up it is restored to the adjacent landowner.

Vinnius states his conclusion thus: "Besides, to explain to you briefly the principle upon which this right, and this acquisition is based, (and) which I have to some extent already pointed out, the bed of a river, beyond the use of the public, was considered by the ancients as a part of the adjacent lands, as though it had been at some former time detached from the latter; the argument being, which seems reasonable, that such island springing up in a river as coheres to the bed, belongs to the adjacent landowners: which (argument) would not hold, unless the bed to which the island adhered were considered a part of the adjacent lands; for the bed takes priority over the island, which follows the character of the bed as its part."[3]

[1] Cuius tamen totum agrum novus alveus occupaverit, licet ad priorem alveum reversum fuerit flumen, non tamen is, cuius is ager fuerit, stricta ratione quicquam in eo alveo habere potest, quia et ille ager qui fuerat desiit esse amissa propria forma, et, quia vicinum praedium nullum habet, non potest ratione vicinitatis ullam partem in eo alveo habere: sed vix est, ut id optineat. Dig. xli. 1. 7. 5. Vinnius thus explains the meaning of the latter portion of the above passage: Postulat hoc stricta ratio; sed aequitas saepe aliud suggerit. Comm. ad Inst. lib. ii. t. 1. text. De Alveo. [2] Dig. xli. 1. 30. 1; *supra*, 10.

[3] Atque ut hic quoque paucis rationem huius iuris et acquisitionis tibi explicem, dixi paulo ante, alveum fluminis extra usum publicum a veteribus existimatum fuisse partem praediorum vicinorum, quasi olim iis detractum; argumento esse, quod placet, insulam manente adhuc alveo in flumine natam vicinorum esse: quod profecto non fieret, nisi alveus, cui

The position laid down by Gaius is also confirmed by Pomponius, who says as follows :—

"The recession of a flood restores that land which the violence of a river has wholly taken away from us. Therefore, if a field, which lies between a public road and a river has been overflowed by an inundation (inundatio), whether it has been overflowed gradually or not gradually, if it has been restored by the river receding with the same violence (with which it came), it belongs to its former owner; for rivers discharge the functions of *censitores*, so as to convert private property into public, and public into private: therefore, in the same way, as this land, when it became the bed of a river, would become public, so now it ought to be the private property of him, whose it was originally."[1]

To the same effect is the law laid down by Ulpian :—

"Similarly, if the river forsakes its own bed and begins to flow through another (channel), anything done in the old bed does not fall within the scope of this Interdict; in fact it shall not then have been done in a public river at all, because it (the old bed) is the property of both the adjoining neighbours, or, if the land be limited land (ager limitatus), may become the property of the first occupant: it certainly ceases to be public. And that channel which the river made for itself, if it was private, nevertheless becomes public: because it is impossible that the bed of a public river should not be public."[2]

With reference to the passage, namely, 'sed vix est, ut id optineat,' —that is, (equity) would hardly allow this (strictness) always to prevail,— which occurs at the end of the text of Gaius I quoted a few moments ago, Vinnius in his commentary thus observes :—

"The principle of equity and justice again and again suggests that

insula cohaeret, et ipse vicinorum praediorum pars intelligeretur: nam prior est alvei ratio quam Insulae, quae conditionem alvei ut pars eius sequitur. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Alveo.

[1] Alluvio agrum restituit eum, quem impetus fluminis totum abstulit. itaque si ager, qui inter viam publicam et flumen fuit, inundatione fluminis occupatus esset, sive paulatim occupatus est sive non paulatim, sed eodem impetu recessu fluminis restitutus, ad pristinum dominum pertinet: flumina enim censitorum vice funguntur, ut ex privato in publicum addicant et ex publico in privatum: itaque sicuti hic fundus, cum alveus fluminis factus esset, fuisset publicus, ita nunc privatus eius esse debet, cuius antea fuit. Dig. xli. 1. 30. 3.

[2] Simili modo et si flumen alveum suum reliquit et alia fluere coeperit, quidquid in veteri alveo factum est, ad hoc interdictum non pertinet: non enim in flumine publico factum erit, quod est utriusque vicini aut, si limitatus est ager, occupantis alveus fiet: certe desinit esse publicus. ille etiam alveus, quem sibi flumen fecit, etsi privatus ante fuit, incipit tamen esse publicus, quia impossibile est, ut alveus fluminis publici non fit publicus. Dig. xliii. 12. 1. 7.

the bed should rather be restored to its former owner than that it should be adjudged to the possessors of adjacent lands. With regard to this, it is not easy to define the (rule) positively, but each case ought to be determined according to its own circumstances. Suppose the river leaving its natural bed occupies the land of any person (whether gradually or not gradually, makes no difference), as if with the object apparently of acquiring in it a new bed; not a long while after, it suddenly returns to its old place with the same violence with which it had quitted it; it is most equitable that on this retrocession of the river the land should be restored to its former owner, though the violence of the river should have deprived it of its form; Dig. xli. 1. 7. 5. *in fin;* xli. 1. 30. 3; vii. 4. 23), inasmuch as this kind of occupation does not differ very much from inundation. But if the river quits (the new bed), not with the same violence with which it came, but by means of slow and gradual retrocession comes back to its former place by the process of alluvion, then that portion of the bed which it gradually leaves dry behind itself, ought not, it seems, to be restored to its former owner, but ought to be considered as an accession by alluvion to the possessors of the adjacent lands; (Dig. xli. 1. 38; Cod. vii. 41. 1). It was for this very reason, I think, that Pomponius advisedly used the words 'with the same violence,' (eodem impetu) in Dig. xli. 1. 30. 3."[1]

In support of this opinion, he refers to a law in the Code[2] and

[1] Saepe enim aequi et boni ratio suadet, ut priori potius domino alveus restituatur, quam adiudicetur vicinis possessoribus. De quo haud facile quid certi definiri potest, sed ex circumstantiis judicandum est. Finge, flumen relicto naturali alveo agrum alicuius occupasse (sive paulatim, sive non paulatim, nihil interest) ita ut novum hic sibi alveum quaesisse videatur; deinde nec ita multo post tempore in veterem locum subito atque eodem impetu, quo perruperat, se recepisse; aequissimum est, agrum recessu fluminis restitutum ad pristinum dominum reverti, licet formam agri impetus fluminis abstulerit, *d. l.* 7. § *quod si* 5. *in fin. d. l. ergo* 30. § 3. *hoc t. l. si ager* 2. *quibus mod. usufruct. am.* quia huiusmodi occupatio non longe abest ab inundatione. At si flumen non eodem impetu, quo venit, discedat, sed lente et minutatim recedendo, alluvione in pristinum locum redeat, spatium illud alvei, quod siccum post se sensim reliquit, non videtur priori domino restituendum, sed alluvione accrescere proximorum praediorum possessoribus, leg. *Attius*, 38. *hoc. tit.* fac. *l.* 1. *C. de alluv.* Atque ob hanc causam arbitror Pomponium in *d l. ergo* 30. § 3. *et d. l. si ager* 23. consulto expressisse haec verba, *eodem impetu.* Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Alveo. Sed quemadmodum, si eodem impetu discesserit aqua, quo venit, restituatur proprietas, ita et usum fructum restituendum dicendum est. Dig. vii. 4. 23, (Pomponius).

[2] Et cum fluvius priore alveo derelicto, alium sibi facit: ager, quem circumit, prioris domini manet. quodsi paulatim ita ferat, ut alteri parti applicet: id alluvionis iure ei quaeritur, cuius fundo accrescit. Cod. vii. 41. 1.

to the following case considered by Alfenus Varus to be found in the Digest:—

"Attius had a field adjoining a public road: beyond the road there was a river and land belonging to Lucius Titius: the river moving on by slow degrees first of all washed away a plot of land which lay between the road and the river and then carried away the road. Afterwards it gradually receded, and came back to its former place by (the process of) alluvion. It was held that when the river carried away the field and the public road, that field became his who had land on the opposite side of the river: afterwards when (the river) by slow degrees went back again, it took away the land from him to whom it had been assigned, and gave it to the owner of the land across the road, because his land was nearest to the river; that property, however, which had been public could not be acquired by any one; but still the road, it is said, in no way prevented the land cast by alluvion on the other side of the road becoming the property of Attius; because the road itself would be a part of the land (of Attius)."[1]

Therefore, the general rule, which may be gathered from this discussion by Vinnius, is shortly this that, when the river leaving its natural bed occupies the land of any person, and afterwards suddenly and violently, and not by the process of slow and gradual alluvion, reverts to its old bed, then the land in which the river had made its second bed ought to remain the property of its former owner.

J. Voet, however, in his commentary on the Digest, expresses a view

[1] Attius fundum habebat secundum viam publicam: ultra viam flumen erat et ager Lucii Titii: fluit flumen paulatim, primum omnium agrum, qui inter viam et flumen esset, ambedit et viam sustulit, postea rursus minutatim recessit et alluvione in antiquum locum rediit. respondit, cum flumen agrum et viam publicam sustulisset, eum agrum eius factum esse, qui trans flumen fundum habuisset: postea cum paulatim retro redisset, ademisse ei, cuius factus esset, et addidisse ei, cuius trans viam esset, quoniam eius fundus proximus flumini esset; id autem, quod publicum fuisset, nemini accessisset. nec tamen impedimento viam esse ait, quo minus ager, qui trans viam alluvione relictus est, Attii fieret: nam ipsa quoque via fundi esset. Dig. xli. 1. 38.

The relative positions of the fields, the public road and the river respectively seem to be as follows:

Field of Attius ————————

PUBLIC ROAD .....

Field of an anonymous person ————————

River ~~~~~~~~~~~~~~~~~~~~

Field of Lucius Titius ————————

Vide Pothier, Pandectae, lib. xli. t. 1. § 28 (notis).

of the law regarding the ownership of abandoned beds different from that entertained by Vinnius. He thinks that Justinian advisedly rejected the qualification which Gaius had engrafted upon the general rule, and holds that the rule as laid down by Justinian, namely, that in all cases where the river deserting its second bed either reverts to its original bed or makes a third bed for itself, the second bed should be divided among the adjacent landowners in proportion to their respective riparian interests, is far more equitable than the one suggested by Gaius, namely, that in some cases the second bed should be restored to its previous owner.[1]

Inundatio.—As regards Inundatio, or flood, the Roman lawyers are unanimous in declaring that it produces no jural change whatever. Justinian using the words of Gaius[2] says:—

"It is otherwise if one's land is wholly inundated, for an inundation does not permanently alter the nature of the land, and consequently if the water goes back, the soil clearly belongs to its previous owner."[3]

What inundatio signifies, is thus explained by Vinnius in his commentary on the Institutes:—"It is properly speaking an inundation, when a river augmented by showers or by the melting of snow or by any other cause, outspreads its waters over the adjacent fields in such manner that it does not change its banks or its bed;[4] (Dig. xliii. 12. 1. 5). When this happens, Justinian following Gaius (Dig. xli. 1. 7. 6) declares, that the proprietorship of the land is not lost: and that, consequently, when the water subsides, the land, which was thus covered, is not added to the lands of the adjoining owners, but continues to be his whose it was before the inundation. And then he adds this reason, (namely), that inundation does not permanently alter the character (species) of the land, implying thereby that in the case of inundation, the land does not lose its proper form as it does when the river changes its bed; because the bed is supposed to be formed by the river flowing over the land for a considerable time, and slowly excavating it, whereby its surface stratum disappears; whereas by inun-

1 J. Voet, Comm. ad Pand. lib. xli. t. 1. § 18.

2 Dig. xli. 1. 7. 6.

3 2 Moyle, Imp. Just. Inst. 40. Alia sane causa est, si cuius totus ager inundatus fuerit. neque enim inundatio speciem fundi commutat et ob id, si recesserit aqua, palam est eum fundum eius manere, cuius et fuit. Inst. ii. 1. 24.

4 Inundatio propriè est, cum flumen imbribus, vel nivibus, vel qua alia ratione auctum in vicinos campos ita se effundit, ut nec ripas alveum suum mutet, *l.* 1. § *ripa* 5 *de flum.* Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Inundatione.

dation the lands are all at once with a sudden violence invaded and are simply covered by water; it cannot be said that by such violence they, (*i. e.*, the lands) are comminuted, dissolved or excavated, or that they are deprived of their proper form. Although, at best the higher parts of the ground are washed down, yet the solid parts of the interior of the ground (*i. e.*, the substratum) remain intact; and though there be a change in any of its qualities, yet there is no more change in its substance than there is when a portion of a field is encroached on by a lake, in which case it is certain that the rights are not at all altered."[1]

Grotius is of opinion that the distinction thus drawn by Roman lawyers between an inundation retiring all of a sudden and an inundation receding slowly and gradually,—preserving the right of the previous owner to the overflowed land in the one case and assigning the abandoned bed to the adjacent landowners in the other,—may well be introduced by positive law as tending to make people more careful in securing their banks, but it does not at all follow from natural law[2] or natural reason; and he holds that in both cases the right of the previous owner ought to subsist,[3] though in some cases a presumption of abandonment of such land by him may arise if the inundation is excessive and continues for a long length of time and no indications of his intention to retain his property therein are apparent. But such presumption being naturally variable and uncertain, the positive laws of some countries have, he states, fixed definite periods after the lapse of which the owner's right to the submerged land is lost, unless he preserves his title to it by the exercise of some acts of ownership, *e. g.*, by fishing,—a proviso which the Roman lawyers, however, rejected.

[1] Hoc cum fit, ait Justinianus post Gaium, *l.* 7. § *aliud sanè* 6. *hoc tit.* fundi proprietatem non amitti: et ideo recedente aqua, fundum, qui occupatus fuerat, non adici vicinis possessoribus, sed eius manere, cuius ante inundationem fuerat. Et addit hanc rationem, quia inundatio fundi speciem non commutat, quasi dicat, non ut alveo facto propriam formam ager amittit, ita et inundatione: quippe alveum fieri diuturno lapsu fluminis et lenta excavatione agri, ut iam plana eius facies amplius non appareat: inundatione autem uno subitaneo impetu praedia invadi, atque aqua cooperiri dumtaxat, non comminui, dissolvi aut excavari, aut formam amisisse dici possunt, *d. l.* 1. §. *aliter* 9 *de flum.* Atque ut maximè summa pars agri in arenam dissolvatur, manet tamen solida pars fundi interior: et ut de qualitate aliquid mutet, substantiam non mutat non magis quam pars agri, quae a lacu hauritur, cuius ius non mutari certum est . . . . . Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Inundatione. *Cf.* J. Voet Comm. ad Pand. lib. xli. t. 1. § 19.

[2] Grotius, de Iur. Bell. et Pac. lib. ii. c. 8. § 8

[3] *Ibid.*, § 10.

Owners of qualified interests in land who may claim alluvions.—Under the Roman law, a pledge-creditor and a hypothecary-creditor, that is to say, persons who acquired an interest in land under a pledge (pignus) or a hypothec (hypotheca) were entitled to have the same interest extended over increments annexed thereto by alluvion subsequent to the pledge or the hypothec.[1] According to Ulpian, a usufructuary (fructuarius) also had a right to accessions by alluvion to land over which he had a right of usufruct (usufructus), but he had no right to islands which might rise in front of such land.[2]

Alluvions liable to additional tax.—In the time of the Emperors, lands gained by alluvion were subjected to the payment of an additional tribute or tax to the treasury, and lands lost by diluvion were exempted from such payment.[3]

Alluvion and diluvion under French law.—Let us next proceed to see how the principles of law which we have just discussed, have been developed and elaborated in the legal system of France. In pursuing this enquiry, it will be convenient to adhere to the original classification of the subject-matter, namely, (i) alluvion, (ii) avulsion, (iii) islands, and (iv) abandoned beds of rivers.

I. **Alluvion.**—The Code Civil, article 556, thus defines alluvion and declares to whom its ownership is to belong:—

A deposit and increase of earth formed gradually and imperceptibly on soil bordering on a river or other stream, is denominated 'alluvion,' and it is for the benefit of the riparian proprietor, whether in respect of a river or stream navigable, 'flottable,' or not; on condition, in the first two cases of leaving a landing-place or towing-path conformably to regulations.[4]

Under the old French law, alluvions formed on the banks of navi-

[1] Si nuda proprietas pignori data sit, usus fructus, qui postea adcreverit, pignori erit: eadem causa est alluvionis. Dig. xiii. 7. 18. 1. (Paulus). Si fundus hypothecae datus sit, deinde alluvione maior factus est, totus obligabitur. Dig. xx. 1. 16 pr. (Marcian).

[2] Huic vicinus tractatus est, qui solet in eo quod accessit tractari: et placuit alluvionis quoque usum fructum ad fructuarium pertinere. sed si insula iuxta fundum in flumine nata sit, eius usum fructum ad fructuariam non pertinere Pegasus scribit, licet proprietati accedat: esse enim veluti proprium fundum, cuius usus fructus ad te non pertineat. Dig. vii. 1. 9. 4, (Ulpian). But the right to alluvion was denied by Paulus, who held that it went to the dominus. Paulus, Sent. iii. 6. 22.

[3] Cod. vii. 41. 2, 3.

[4] Code Civil. § 556.

gable rivers belonged to the king, and the riparian proprietors could claim no right to them otherwise than under grants from him.[1]

Lands gained by alluvion from the sea, or by dereliction thereof, belong under the Code Civil to the state, and they do not acquire the character of alluvion or dereliction until they have been completely abandoned by the withdrawal of the waters of the sea.[2]

The state may grant, subject to such conditions as it may choose to impose, alluvions and derelictions of the sea to private individuals, who may, therefore, also claim them by prescription.[3]

A deposit of earth has the character of alluvion, if it be formed under the surface of the water gradually and imperceptibly; it matters little that its appearance above water has been sudden and the result of subsidence of an inundation; the gradual and imperceptible growth which is necessary in order to constitute alluvion, relates to the mode of formation of the alluvial deposit and not to its emergence above the surface of water.[4]

If a sandbank forms in the bed of a navigable river, so that it remains covered with water during several months of the year, it cannot be considered as an alluvion belonging, by right of accession to the adjacent riparian owner; but is regarded as still forming a portion of the bed of the river and therefore belonging to the state.[5] Nor does a deposit of earth formed on the banks of a navigable river acquire the character of alluvion, if it remains covered with water when such water is at the mean height necessary for navigation.[6]

Lands temporarily discovered by water at ebb tide cannot be considered as an alluvion, more specially at that period when, by reason of the proximity of the sea, they happen to be entirely submerged by the spring tides.[7]

An essential pre-requisite of alluvion is the physical adherence of the increment to the riparian soil. Therefore, a deposit of earth formed in a river, so that it is separated from the adjacent riparian soil by an arm of the river or by a streamlet (fil d'eau) cannot be considered

[1] Pothier, Droit Civil, tom. iv. p. 1. c. 2. s. 3. art. 2. n. 157.

[2] Sirey, Les Codes Annotes, v. 1. § 538, note (nos. 38, 39).

[3] *Ibid.*, § 538, note (nos. 42-44).

[4] *Ibid.*, § 556 note (no. 2).

[5] *Ibid.*, § 556, note (no. 3).

[6] *Ibid.*, note (no. 4).

[7] *Ibid.*, note (no. 5). But upon this point opinions seem to differ.

as an alluvion.[1] It has, however, been adjudged subsequently, that it is sufficient if the adherence of deposits to the riparian estate is habitual, though only at certain periods of the year it may be separated from the latter by a streamlet.[2]

A deposit of earth formed insensibly in the bed of a river and adhering under the water to the subsoil of a riparian estate, has the character of alluvion, and belongs to the owner of such subsoil even though at the surface of the water it may be separated from such soil by a streamlet or a canal.[3]

A deposit of earth gradually and imperceptibly added to riparian land, has the character of alluvion and belongs to the owner of such land, even though it should have been occasioned by the labour of the human hand executed in the river or stream or even by works of art executed by the state in a navigable or 'flottable' river.[4] But it is otherwise, if the deposit of soil resulting from works of art takes place suddenly and perceptibly.[5]

There appears to be a conflict of authority in France upon the point whether alluvions formed in a river or stream along a public road or highway belong to the state or to the commune, or whether they belong to the owners of estates situated on the other side of the road or way.[6] But it is settled that if they form along a towpath, they enure to the benefit of the riparian owners.[7]

The alluvion which takes place in a canalised stream or a canal, does not accrue to the riparian owners, the banks thereof being the property of the state or of him who has excavated the canal.[8]

The right of alluvion does not apply to increments annexed to the banks of torrents (*i. e.* intermittent streams); the owners of the soil of the bed become the owners of the increments which the waters have added thereto by superposition.[9]

As alluvions formed on the banks of a stream, whether navigable or

1 Sirey, Les Codes Annotes, v 1. § 556, note (nos 6, 7).
2 *Ibid*, note (no. 8).
3 *Ibid.*, note (no. 9).
4 *Ibid.*, note (nos. 14, 15).
5 *Ibid.*, note (no. 16).
6 *Ibid.*, note (nos. 17, 18).
7 *Ibid*, note (no. 20).
8 *Ibid.*, note (no. 23).
9 *Ibid.*, note (no. 24 (2)).

not, belong to the riparian proprietors from the time that the deposit takes place, it follows that if the state desires to canalise the stream, it cannot remove the alluvions without indemnifying the riparian owners for the loss which they suffer on account of it, even though the riparian owners may not have previously taken possession of such alluvions.[1]

Right of usufructuaries, legatees and secured creditors to alluvion.—Usufructuaries,[2] legatees, secured creditors, and in general, all third persons who acquire an interest in, or a right to follow, the land, are entitled to alluvions, according to the nature of the contract in each case.[3]

Right of a vendee to alluvion.—In the case of a sale, the buyer is entitled to accretions formed after his purchase, even though the extent of the area sold may have been expressly stated[4]; but as to alluvions formed previous to his purchase, his right to them depends on the terms of the contract of sale, or on the intentions of the parties, and does not necessarily pass under the conveyance.[5] Where the sale is subject to a power of re-purchase, the vendor is entitled, when he exercises the option so reserved to him, to all accretions formed subsequent to the sale.[6]

If a person without title sells riparian land to another, the true owner may recover from the buyer not only such land, but also all increments that may have been added to it, though the buyer may be entitled to claim compensation in respect of such increment.[7]

Whenever any act of alienation is dissolved or rescinded, and the subject-matter of such alienation is ordered to be restored to the alienor, the latter is entitled to have it together with all alluvial increments which may have accrued thereto.[8]

Right of a farmer and an emphyteuta to alluvion.—A farmer is entitled to alluvions formed after the date of his lease, though there is some difference of opinion amongst the authorities as to whether he is liable to pay any additional rent for them.[9] But the emphyteuta acquires the

[1] Sirey, Les Codes Annotes, v. 1. § 556, note (no. 25).

[2] Code Civil, § 596.

[3] Sirey, Les Codes Annotes, v. 1. § 556, note (no. 26).

[4] *Ibid.*

[5] *Ibid.*, note (no. 27).

[6] *Ibid.*, note (no. 27 (2)).

[7] *Ibid.*, note (no. 28).

[8] *Ibid.*, note (no. 29).

[9] *Ibid.*, note (no. 30).

alluvion free from the obligation of paying any increased rent, even though the exact area may have been specified in the lease.[1]

A stranger, who is not a riparian proprietor, may by prescription acquire a right to an alluvion, either directly or by prescribing for the riparian estate to which the alluvion adheres.[2]

Dereliction.—The Code Civil draws no jural distinction between deposits of earth formed by the process of alluvion and lands gained by the dereliction of a portion of the bed of a river, because article 557 goes on to provide that in the case of derelictions occasioned by a river receding insensibly from one of its banks, and encroaching on the other, the proprietor of the bank discovered profits by the alluvion (or, more properly speaking, by the abandoned portion of the bed), and the proprietor on the opposite side loses his right to reclaim the land encroached upon by the river.[3]

Derelictions of the sea, however, belong to the state and not to the littoral proprietor.[4]

Inundation.—Inundations, even for long periods, do not affect the proprietorship of the submerged soil, under the law of France, as they do not even under the Roman law. Land, which during several years, has been covered by the overflow of a stream, is not, when the waters happen to retire, assimilated to the bed of the stream, and considered thenceforward as an acquisition for the benefit of the adjoining riparian proprietors, but is deemed to continue as the property of its previous owner, although it might have been denuded of all soil susceptible of culture and vegetation.[5] It is the same with regard to lands which might have remained submerged under water for more than thirty years, provided, however, the river has not abandoned its ancient bed.[6]

Alluvion in lakes and ponds.—Article 558 of the Code Civil declares that:—

Alluvion does not take place with respect to lakes and ponds, the proprietor of which preserves always the land which the water covers when it is at the pond's full height, even though the volume of water should diminish.

[1] Sirey, Les Codes Annotes, v. § 556, note (no. 31).

[2] *Ibid.*, note (no. 32).

[3] Code Civil, § 557.

[4] Sirey, Les Codes Annotes, v. 1. § 538, note (nos. 38, 39).

[5] *Ibid.*, § 556, note (no. 10).

[6] *Ibid.*, note (no. 10 (2)).

In like manner, the proprietor of a pond acquires no right over land bordering on his pond which may happen to be covered by an extraordinary flood.

II. **Avulsion.**—Article 559 of the Code thus lays down the law with regard to avulsion:—

If a river or a stream, navigable or not, carries away by sudden violence a considerable and identifiable part of a field on its banks, and bears it to a lower field, or on its opposite bank, the owner of the part carried away may reclaim his property; but he is required to make his demand within a year: after this interval it becomes inadmissible, unless the proprietor of the field to which the part carried away has been united, has not yet taken possession thereof.

It has been held that article 559 applies also to a case where a new branch of the stream suddenly cutting off a portion of a field has transformed it into an island.[1]

III. **Islands.**—I stated in a previous lecture[2] that, according to the law of France, the beds of all rivers which are navigable or 'flottable,' are not susceptible of private ownership, but are vested in the state as a part of the public domain; the proprietorship of islands being a necessary consequence of the proprietorship of the bed, it follows that the proprietorship of islands formed in such rivers should, according to that law, be also regarded as vested in the state, and accordingly we find article 560 of the Code Civil laying down that:—

Islands, islets, and deposits of earth formed in the bed of rivers or streams, navigable or 'flottables,' belong to the state, if there be no title or prescription to the contrary.

An island thus formed belongs to the state, even though it occupies submerged sites belonging to private proprietors, provided it has formed gradually and not in a sudden manner. To such a case as this, articles 562 and 563 of the Code Civil do not apply.[3]

But the beds of streams which are neither navigable nor 'flottables' being, as we have already seen, the property of the riparian proprietors, the Code Civil in article 561 lays down that:—

Islands and deposits of earth formed in rivers and streams neither navigable nor 'flottables,' belong to the riparian proprietor on that side on which the island is formed; if the island be not formed on one side

[1] Sirey, Les Codes Annotes, v. 1. § 559, note (no. 1).

[2] *Supra*, 104.

[3] *Ibid.*, § 560, note (no. 2).

only, it belongs to the riparian proprietors on both sides, divided by an imaginary line drawn through the middle of the river.[1]

This article applies even though the stream may be 'flottable' for logs only.[2]

The law of France both prior to[3] and since the Code Civil follows the rule of Roman law with regard to the ownership of islands formed by a branch of a river intersecting a field, and separating it from the mainland. Article 562 of the Code Civil lays down that:—

If a river or stream in forming for itself a new arm, divide and surround a field belonging to a riparian proprietor, and thereby form an island, such proprietor shall retain the ownership of his land, although the island be formed in a river or in a stream navigable or 'flottable.'

IV. **Abandoned beds of rivers.**—The old law of France, prior to the Code Civil, following in this respect the provisions of the Roman law, declared that the bed abandoned by a river or stream belongs to the riparian proprietors by right of alluvion, the proprietors of the soil in which the river or stream makes a new bed having no right whatever to the soil of the deserted bed.[4] But article 563 of the Code Civil abrogates this rule and provides that:—

If a river or a stream, whether navigable, or 'flottable' or not, forms a new channel abandoning its ancient bed, the proprietors of the soil newly occupied by the river take, by title of indemnity, the ancient abandoned bed, each in proportion to the land of which he has been deprived.

This seems to be in accordance with the view of Puffendorf, who condemning the rule of the Roman law upon this matter, maintained that the deserted bed ought, in equity, to be adjudged to the proprietor of the land occupied by the new bed to console him for his loss, and that if the river again forsook this new bed, it should be restored to its previous owner and should not be divided among the riparian owners.[5]

Although under article 563, the proprietors of the soil newly occupied

1 As to the old law, which is the same as the present, see Pothier, Droit Civil, tom. iv. p. 1 ch. 2. s. 3. art. 2, no. 164.

2 Sirey, Les Codes Annotes, v. 1. § 560. note (no. 5).

3 Pothier, Droit Civil, tom. iv. p. 1. ch. 2, s. 3. art. 2. no. 162.

4 *Ibid.*, no. 160; Sirey, Les Codes Annotes, v. 1. § 563, note (no. 4). But in the jurisdiction of the Parliament of Toulouse the rule of the Roman law is followed. *Ibid.*, note (no. 5.)

5 Puffendorf, de Iur. Nat. et Gent. lib. iv. c. 7. § 12.

by the river are entitled to the soil of the abandoned bed, yet they are not entitled to islands or islets which may have previously formed in such bed and become vested in the state or in the riparian owners.[1] It is worthy of note that a comparison of this article with article 557, leads to a somewhat curious result, namely, that if a river abandons a *portion* of its bed, and encroaches upon the land of the opposite riparian proprietor, the portion of the bed thus abandoned belongs to the adjoining and not to the opposite riparian proprietor, but that if it happens to abandon the *whole* of its bed and occupy the land of the riparian proprietor on the opposite side, the bed thus wholly abandoned belongs to the latter.

[1] Sirey, Les Codes Annotes, v. 1. § 563, note (no. 2).

LECTURE VI.

ALLUVION AND DILUVION,—*(Continued)*.

(*English and American Law*).

Value and importance in this country of rules of English and American law relating to alluvion—Bracton—A. Maritima incrementa—Divisible into three kinds, alluvio maris, recessus maris, and insula maris—(i) Alluvion, according to Lord Hale—According to Blackstone—Result of the authorities—*Rex* v. *Lord Yarborough*—Meaning of the expression 'imperceptible accretion'—*Attorney-General* v. *Chambers*—Definition of alluvion—Right to alluvion resulting from artificial causes—Applicability of the principle of alluvion to the converse case of encroachment of water upon land—Applicability or otherwise of the rule of alluvion, where the original limits of littoral or riparian estates towards the sea or river are ascertainable or ascertained—Discussion of authorities—*Foster* v. *Wright*—Mr. Houck's argument that rule of alluvion ought not to apply to grants made in the United States of lands bounded by 'sectional lines'—Rule of alluvion not applicable to estates which have no water frontage—Nature of right acquired in increments added by alluvion—Apportionment of alluvion amongst competing frontagers—*Thornton* v. *Grant*—(ii) Dereliction—Ownership of lands abandoned by the sea or a tidal navigable river—Effect of inundation on the ownership of lands—Effect of sudden change of the channel of a river upon the ownership of the bed newly occupied—*Mayor of Carlisle* v. *Graham*—Custom as to the medium filum of the Severn (for a portion of its course) being the constant boundary between the manors on opposite banks—Criterion for determining the legal character of such formations in the sea or in a river as lie on the border-land between alluvion and dereliction—(iii) Islands—Ownership of an island under different circumstances—(iv) Avulsion—B. Fluvialia incrementa—(i) Alluvion—(ii) Dereliction—Ownership of lands derelicted—Effect of sudden or gradual change of the bed of a stream on the position of the boundary line between conterminous proprietors—(iii) Islands—Apportionment of islands among riparian proprietors—Rule of the Civil Code of Louisiana—Mode of division of a second island formed between the first and the opposite mainland—*Earl of Zetland* v. *The Glover Incorporation of Perth*—*Trustees of Hopkins Academy* v. *Dickinson*.

Value and importance of the English and American law of alluvion.—Besides the doctrines of the Roman Civil law with regard to alluvion and diluvion, the principles expounded by eminent judges and renowned text-writers in England upon that subject, and developed and elaborated by like authorities in America,[1] by reason of the fluvial pheno-

[1] The American lawyers are considered high authorities on the law of alluvion, the Courts of the United States having had to consider questions relating to it to a far greater degree than the Courts of other countries. See speech of the Hon'ble Mr. W. Stokes on the Alluvion Bill. Gazette of India, Supplement, Oct. 12, 1878, p. 1599.

mena in that great continent affording more frequent and far greater practical opportunities for their discussion and application, are often resorted to as rules of 'equity and good conscience' for the determination of similar questions arising in this country, whenever the statute-law here fails to furnish a satisfactory solution. It may be useful therefore to consider in detail, so far as the limits of this lecture will permit, the provisions of the law of England and America upon this matter.

Whether Bracton, the earliest writer on the Common law of England, formulated the rules of the Common law upon this subject,[1] or whether he simply interpolated the rules of the Civil law,[2] we need not stop to enquire. It is sufficient for the present purpose to mention that he has stated the law in almost the same terms as those in which Justinian had laid it down, and to which I have already called your attention.

Lord Hale, however, has proceeded on a firmer and surer basis. He has deduced the various rules of law upon this subject from the materials with which the Year Books furnished him.

In discussing, therefore, these rules, I shall frequently have occasion, in the course of the present lecture, to refer to the De Jure Maris.

Classification of increments of lands caused by the action of running water.—

Increments of lands caused by the action of running water may for purposes of convenience be divided into two classes :—

First.—Maritima incrementa, that is, accessions of land caused by the action of the sea, or by the action of the waters of an arm of the sea, or of a tidal navigable river.

Secondly.—Fluvialia incrementa, that is, accessions of land caused by the action of the waters of a non-tidal or private stream.

Lord Hale classifies maritime increments under three heads, *viz.*,—Increase—

1. per projectionem vel alluvionem.
2. per relictionem vel desertionem.
3. per insulae productionem.[3]

[1] *Per* Best, C. J., in *Reg* v. *Lord Yarborough*, 2 Bligh. (N. S.) 147; see Fortescue, 408, for opinion of Parker, C. B. to the same effect; *Ball* v. *Herbert*, 3 T. R. 253, *per* Best. J.

[2] *Per* Buller, J., in *Ball* v. *Herbert*, 3 T. R. 253; see also Sir Mathew Hale's First Treatise, printed in Morris' Hist. of the Foreshore, p. 360, ('Civil Law, from whom Bracton borrows much of his learning in this particular').

[3] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 14; Morris' Hist. of the Foreshore, 380.

or, as he says in another place—

1. Alluvio maris.
2. Recessus maris.
3. Insula maris.[1]

A. *Maritima incrementa*—Let us now proceed to see what the rules of the English and American law are with regard to these three kinds of maritime increments, in the order in which I have just enumerated them.

1. **Alluvion—According to Lord Hale.**—As to alluvion, Lord Hale says:—

"The increase, per alluvionem, is, when the sea by casting up sand and earth doth by degrees increase the land, and shut itself out further than the ancient bounds; and this is usual. The reason why this belongs to the Crown is, because in truth the soil, where there is now dry land, was formerly part of the very fundus maris, and consequently belongs to the king. But indeed if such alluvion be so insensible that it cannot be by any means found that the sea was there, idem est non esse et non apparere, the land thus increased belongs as a perquisite to the owner of the land adjacent."[2]

He says in another place:—

"For the ius alluvionis which is an increase of the land adjoining by the projection of the sea casting up and adding sand and slubb to the adjoining land, whereby it is increased, and for the most part by insensible degrees, Bracton, lib. 2. cap. 2. writes thus:" (he quotes here a passage from Bracton in which he lays down the law regarding alluvion). —"But Bracton follows the Civil law in this and some other following places. And yet even according to this, the Common law doth regularly hold at this day between party and party. But it is doubted in case of an arm of the sea, 22 Ass. 93.

"This ius alluvionis, as I have before said, is de iure communi by the law of England the king's, *viz.*, if by any marks or measures it can be known what is so gained; for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, idem est non esse et non apparere, as well in maritime increases as in increases by inland rivers.

[1] Hale, de Iure Maris, p. 1 c. 6; Hargrave's Law Tracts, 28; Morris' Hist of the Foreshore, 395.

[2] Hale, de Iure Maris, p 1. c 4; Hargrave's Law Tracts, 14; Morris' Hist. of the Foreshore, 380.

"But yet custom may in this case give this ius alluvionis to the land whereunto it accrues."[1]

According to Blackstone.—Blackstone lays down the law in these words :—

"As to lands gained from the sea either by *alluvion, i. e.,* by the washing up of sand or earth, so as in time to make terra firma, or by *dereliction,* as when the sea shrinks back below the usual water-mark, in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining, for de minimis non curat lex; and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king: for as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry."[2]

Result of the authorities.—It is necessary to remark before we proceed that though Bracton and Lord Hale laid down the doctrine with regard to 'alluvion', yet Blackstone applies it also to gradual and imperceptible derelictions of the waters, and, if I might venture to say, he is right in so doing,[3] for the gradual and insensible retreat of the sea or of a river is generally the effect of its own action by the heaping up of alluvial soil, beach or sand. As Lord Hale himself observes, 'there is no alluvion without some kind of reliction, for the sea shuts out itself.'[4]

It is also evident from the passages I have just now read that, according to Lord Hale and Blackstone, the general rule is, that lands gained from the sea and from tidal navigable rivers belong to the Crown,[5] but that a subject, that is to say, the adjacent littoral proprietor

[1] Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 28; Morris' Hist. of the Foreshore, 395-396.

[2] 2 Black. Com. 261.

[3] Hall on the Seashore, (2nd ed.), 111; Morris' Hist. of the Foreshore, 787; Gould on Waters, § 155.

[4] Hale, de Iure Maris, p. 1. c. 8; Hargrave's Law Tracts, 29; Morris' Hist. of the Foreshore, 397, 399, ('And though there is no alluvion without some kind of reliction, for the sea shuts out itself).'

[5] Dyer, 326, b. n. 5; 1 Keb. 301; where it is said that the right is as ancient as the King's Crown. *Whitaker* v. *Wise*, 2 Keb. 759; *Rex* v. *Lord Yarborough*, 2 Bligh (N. S.) 147; Woolrych on Waters (2nd ed.) 29; "It is not to be understood," says Woolrych, referring to the case of the Abbot of Ramsay, cited in Lord Hale's de Iure Maris, p. 1. c. 6, "that the Crown is not

may claim them, if (i) the aggregate increment or total 'acquest' is small in quantity, and (ii) the accretion is slowly, gradually and imperceptibly added.

That the increment should be small in quantity[1] is clear from the reasons respectively assigned by Lord Hale and Blackstone for this species of acquisition, *viz.*,—'Idem est non esse et non *apparere*,' and, 'De *minimis* non curat lex.' Yet in England instances are not wanting in which littoral proprietors have taken possession of not very inconsiderable quantities of alluvial increments; though Woolrych attributes it rather to forbearance, or neglect to interfere, on the part of the Crown on account of the smallness of the usurpation, than to the absence of any prerogative right to such increments.

Meaning of the expression 'imperceptible accretion'.—But this doctrine was controverted and disapproved in the well-known case of *Rex* v. *Lord Yarborough*,[2] where the Court held that the lord of the adjacent manor was entitled to a quantity of nearly 453 acres of marshy land on the ground of alluvion.[3] So that at the present day it may be taken as a settled rule in England that, any quantity of land, however large,[4] may be claimed by a subject as an accretion by alluvion, provided the accretion satisfies the essential condition that it has been slow, gradual and imperceptible in its progress. The passages in which Lord Hale says that land increased by alluvion belongs to the subject, when it is "so insensible that it cannot be by any means found that the sea was there," or "so insensible and indiscernible by any limits or

entitled by its prerogative to all this increment, to alluvion as well as avulsion, but as Sir William Blackstone observes, 'De minimis non curat lex,' and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore possibly a reciprocal consideration for such possible loss or charge." Woolrych on Waters (2nd ed), 445; Houck on Navigable Rivers, § 232

1 Dav. Rep. 59; 2 Ventr. 188 "If the salt water leave a great quantity of land on the shore, the king shall have the land by his prerogative, and the owner of the adjoining land shall not have it as a prerogative." 2 Roll. Abr. Prerog. B. pl. 11; Houck on Navigable Rivers, § 230; Woolrych on Waters (2nd ed.), 445.

2 3 B & C 91.

3 Schultes thinks that when the question arises between the Crown and a subject, the decision ought to depend on the extent of the 'acquest', and the duration of time elapsed in its accumulation or reliction; but that when it arises between a subject and a subject, the decision ought not to rest upon the duration of time only. On Aquatic Rights 137. This opinion, however, militates against the actual circumstances of the case of *Rex* v. *Lord Yarborough*, *supra*.

4 Hunt on Boundaries, (3rd ed.), 31.

marks that it cannot be known", are doubtless liable to the construction which in *Rex* v. *Lord Yarborough*[1] the counsel for the Crown sought to place upon them, namely, that a subject is entitled to a maritime increment by alluvion only where such increment is so inconsiderable as to be almost 'imperceptible.' But the Court of King's Bench declined to accede to that argument, and held in that case that an imperceptible accretion means one which is imperceptible in its progress, and not one which is imperceptible after a lapse of time. Abbott, C. J., delivering the judgment of the Court in that case said as follows :—

"In these passages, however, Sir Mathew Hale is speaking of the legal consequence of such an accretion, and does not explain what ought to be considered as accretion insensible or imperceptible in itself, but considers that as being insensible, of which it cannot be said with certainty that the sea ever was there. An accretion extremely minute, so minute as to be imperceptible even by known antecedent marks or limits at the end of four or five years, may become, by gradual increase, perceptible by such marks or limits at the end of a century, or even of forty or fifty years. For it is to be remembered that if the limit on one side be land, or something growing or placed thereon, as a tree, a house, or a bank, the limit on the other side will be the sea, which rises to a height varying almost at every tide, and of which the variations do not depend merely upon the ordinary course of nature at fixed and ascertained periods, but in part also, upon the strength and direction of the wind, which are different almost from day to day. And, therefore, these passages from the work of Sir Matthew Hale are not properly applicable to this question. And, considering the word 'imperceptible' in this issue, as connected with the words 'slow and gradual,' we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time. And taking this to be the meaning of the word 'imperceptible,' the only remaining point is, whether the accretion of this land might properly, upon the evidence, be considered by the jury as imperceptible. No one witness has said that it could be perceived, either in its progress, or at the end of a week or a month."

Foundation of the rule of alluvion and the precise nature thereof.—If then the true and the only sensible meaning of the rule is that, where

[1] 3 B. & C. 91.

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the increase is imperceptible in its progress the increment becomes the property of the subject, it follows that it becomes vested in him de die in diem as its growth extends, and what is once vested in him cannot be devested by the circumstance of a still further increase taking place afterwards. It is also clear that after this decision of the Court of King's Bench, which was afterwards affirmed by the House of Lords,[1] the true foundation for the law of alluvion must be sought elsewhere than in the maxim 'de minimis non curat lex' upon which Blackstone, as we have seen, rested it. Thus, in *Attorney-General* v. *Chambers*,[2] Lord Chelmsford, after quoting the passage I have already cited from Blackstone, said:—

"I am not quite satisfied that the principle de minimis non curat lex is the correct explanation of the rule on this subject: because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which, the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron Alderson in the case of *The Hull and Selby Railway Company*,[3] *viz.*, 'That which cannot be perceived in its progress is taken to be as if it never had existed at all.' And as Lord Abinger said in the same case, 'The principle, as to gradual accretion, is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.' It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the seashore."

And Lindley, J., in *Foster* v. *Wright*[4] stated that "the law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water."

1 2 Bligh. N. S. 147; 5 Bing. 163; 1 Dow. N. S. 178.

2 4 De G. & J. 55; 5 Jur. (N. S.) 745.

3 5 M. & W. 327.

4 4 C. P. D. 438. In *Lopez* v. *Muddun Mohan Thakur*, Lord Justice James said that the accretion by alluvion is held to belong to the adjoining owner on account of "the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs." 12 Moo. Ind. App. 467.

In the light of these authorities, alluvion may therefore be defined as an addition made by the action of running water to adjoining land, littoral or riparian, in such slow, gradual and imperceptible manner[1], that it cannot be shown at what time it occurred, the extent of the total increment being wholly immaterial; and the law of alluvion which confers such increment on the adjacent landowner may be taken to rest upon the principle of compensation embodied in the maxim, qui sentit onus debet sentire commodum—the equity of awarding the gradual gain to him who is exposed to the chance of suffering a possible gradual loss, as well as upon the impracticability of identifying from day to day the minute increments and decrements caused by the constant action of running water.[2]

Alluvion resulting from artificial causes.—Such then being the foundation of the law of alluvion, there does not seem to be any reason why it should not be equally applicable, whether the gradual accretion be the result of purely natural or of purely artificial causes or partly of natural and partly of artificial causes; provided, in the case where the gradual accretion is produced by the sole or partial operation of artificial causes, it arises from acts of such a nature as may be done in the lawful exercise of rights of property and are not intended for the sole or express purpose of gaining such an acquisition.[3] Therefore, if manufacturing or mining operations upon lands bordering on the sea or upon a public river cause a gradual silting up of rubbish, slate or other matter, either upon lands where the manufactories or mines are situated, or upon neighbouring property, the materials thus accumulated would be subject to the ordinary rule relating to alluvion, just as if they had been deposited by natural causes.[4]

But the law of alluvion does not apply where the artificial causes do not produce a slow and gradual but a sudden and manifest 'acquest' of land from the sea or from a river; in such case the law

[1] Dist. *Att.-General* v. *Reeves*, (1885) 1 Times, L. R. 675; where the gradual growth of the accretion was proved to have been clearly perceptible by marks and measures as they took place, and the accretion was therefore adjudged to the Crown.

[2] Angell on Watercourses, § 53, note 2; Gould on Waters, § 155.

[3] *Att.-General* v. *Chambers*, 4 De G. & J. 55; 5 Jur. N. S. 745; *Doe* d. *Sheeb Kristo Banerjee* v. *The East India Co.*, 10 Moo. P. C. C. 140; 6 Moo Ind. App 267; *Smart* v. *Magistrate of Dundee*, 8 Bro. P. C. 119; *Proprietors of Waterloo Bridge* v. *Cull*, 5 Jur. N. S. 1288; *Blackpool Pier* v. *Fylde Union*, 46 L. J. M. C. 189.

[4] Hunt on Boundaries (3rd ed.), 33.

relating to dereliction, which I shall presently explain, applies, and the acquisition belongs to the owner of the bed.[1]

In America, it has been held that, if it clearly appears that a wharf or pier built out into navigable water is an encroachment upon the public domain, and in consequence thereof an accretion is formed against the adjoining land, the owner of such land does not acquire a title to the accretion, unless there has been long continued and exclusive adverse possession. But if the state excavates the soil of navigable waters for the purpose of deepening a channel, and deposits the earth in front of land which it has previously conveyed by grant, the grantee becomes entitled to such accretion.[2]

Whether principle of alluvion applicable to converse case of encroachment by water upon land.—The principle which underlies the law of alluvion applies as much to the converse case of encroachment by water upon the land as it does to the case of encroachment by land upon the water. Therefore, where the sea or a tidal navigable river, by gradual and imperceptible progress encroaches on the land of a subject, the land thereby occupied belongs to the Crown.[3]

Whether rule of alluvion applies where original limits of littoral or riparian estates towards the sea or river are fixed or ascertainable.—The next point which I shall discuss is, whether according to English law the rule of alluvion is applicable where the original bounds or limits of the littoral or riparian property to which the accretion adheres are capable of being ascertained by landmarks, maps, evidence of witnesses, or by any other means. Upon this question there appears to have been no slight conflict of authority; but the latest exposition[4] of the law, however, is in favour of the affirmative position. I shall briefly go through the history of the discussion upon the subject, as the point seems to me to be one of some importance, having regard to the fact that a contrary conclusion[5] has been arrived at by the Privy Council upon a similar question arising in India.

"The law of alluvion has no place in limited lands," say both Bracton and Fleta.[6]

Lord Hale lays down the law thus:—"If a fresh river between the

1 *Todd* v. *Dunlop*, 2 Rob. App. Cas. 333.

2 Gould on Waters, § 155.

3 *In re Hull & Selby Ry. Co.*, 5 M. & W., 327.

4 *Foster* v. *Wright*, 4 C. P. D., 438.

5 *Lopez* v. *Muddun Mohan Thakur*, 13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 Suth. W. R. (P. C.) 11.

6 In agris limitatis ius alluvionis locum non habere constat. Bract. lib. ii. c. 2.; Flet. lib. iii. c. 2; Britton, lib. ii. c. 2. *Cf.* Dig. xli. 1. 16.

lands of two lords or owners do insensibly gain on one or the other side it is held, 22 Ass. 93, that the propriety continues as before in the river. But if it be done sensibly and suddenly, then the ownership of the soil remains according to the former bounds. As if the river running between the lands of A and B, leaves his course, and sensibly makes his channel entirely in the lands of A, the whole river belongs to A; aqua cedit solo: and so it is, though if the alteration be by insensible degrees but there be other known boundaries as stakes or extent of land. 22 Ass. pl. 93. And though the book make a question, whether it hold the same law in the case of the sea or the arms of it, yet certainly the law will be all one, as we shall have occasion to shew in the ensuing discourse."[1]

Thus, according to Lord Hale, the law of alluvion does not apply where the riverward boundary or the extent of the riparian land is known or is capable of being ascertained. In the above passage, no doubt, his Lordship deals with the case of gradual encroachment and not of gradual accretion. But the one is merely the converse of the other, and the legal effect of both is ascertained upon the same principle.

The language used by Abbot, C. J., in the passage I have quoted before[2] from his judgment in *Rex* v. *Lord Yarborough*, clearly shows, that in his Lordship's opinion too the rule of alluvion, which awards the gradual accretion to the owner of the adjoining land, would be applicable even where the bounds or limits of such land towards the sea or river were known.

In *In re Hull and Selby Ry. Co.*,[3] the Court expressly held that in the case of gradual encroachment of the banks by a tidal navigable river, the owner of the bed, that is to say, the Crown acquired the ownership of the land encroached upon, and the owner of the bank lost his right to it, even though the exact extent of the encroachment was clearly ascertainable by known limits.

But in *Attorney-General* v. *Chambers*,[4] Lord Chelmsford, L. C., dissented from the rule laid down by Lord Hale, and after quoting from the judgment of Abbot, C. J., the passage I have already cited, observed as follows:—"This, however, is not in accordance with the great authority upon this subject, Lord Hale. He says, in page 28 of his book De Iure

[1] Hale, de Iure Maris, p. 1 c. 1; Hargrave's Law Tracts, 5, 6; Morris' Hist. of the Foreshore, 371.

[2] *Supra*, 151.

[3] 5 M. & W. 327.

[4] 4 De G. & J. (55), 71; 5 Jur. N. S. 745.

Maris, 'This ius alluvionis, as I have before said, is, de iure communi by the law of England the King's, *viz*, if by any marks or measures it can be known what is so gained, for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, idem est non esse et non apparere as well in maritime increases as in increases by inland rivers.' Lord Hale here clearly limits the law of gradual accretions to cases where the boundaries of the seashore and adjoining land are so indiscernible, that it is impossible to discover the slow and gradual changes which are from time to time occurring, and when at the end of a long period it is evident that there has been a considerable gain from the shore, yet the exact amount of it, from the want of some mark of the original boundary line, cannot be determined. But when the limits are clear and defined, and the exact space between these limits and the new high-water line can be clearly shown, although from day to day, or even from week to week, the progress of the accretion is not discernible, why should a rule be applied which is founded upon a reason which has no existence in the particular case?"[1]

The case of *Ford* v. *Lacey*[2] is the next in order of time. There the entire bed of the river at the locus in quo belonged to the owner of the land on its eastern bank, and three plots of land immediately contiguous to the western bank, and forming a portion of the bed, were left bare by the gradual recession of the river. Evidence was also given of continuous acts of ownership on the part of the landowner on the eastern bank since the alteration of the bed of the river. The Court of Exchequer held that he was entitled to those plots.

Thus stood the law until the year 1878, when the Court of Common Pleas Division, in *Foster* v. *Wright*[3], disagreed with the view expressed by Lord Chelmsford in *Attorney-General* v. *Chambers*,[4] and came to a different conclusion. That was a case of gradual encroachment of land on the

[1] It is curious to remark that although Lord Chelmsford delivered this judgment in 1859, yet Lord Justice James, in pronouncing the judgment of the Privy Council in 1870 in *Lopez* v. *Muddan Mohan Thakur*, (13 Moo. Ind. App. 467) after stating the rule of gradual accretion as laid down in the two cases, *Rex* v. *Lord Yarborough*, (2 Bligh. N. S. 147) and *In re Hull & Selby Ry. Co.* (5 M. & W. 327) said:—"To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps or by mine under the sea, or other means of that kind, has never been judicially determined." The report of the arguments of counsel in Moore shews that the case of *Attorney-General* v. *Chambers* (4 De G. & J. 55; 5 Jur. N. S. 745) was not at all cited before the Judicial Committee.

[2] 7 H. & N. 151; 7 Jur. N. S. 684.

[3] 4 C. P. D., 438.

[4] *Supra.*

bank of a non-tidal and non-navigable river, the riverward boundary of such land as it existed before the encroachment being clearly ascertainable. So far as the point now under consideration is concerned, all the authorities are agreed that there is no difference between tidal and non-tidal or navigable and non-navigable rivers. Indeed Lord Hale himself observes that there is no difference in this respect between the sea and its arms and other waters.[1] The Court there was of opinion that the distinction relied upon by Lord Chelmsford between the case where the old boundaries are clear and defined, and the case where such boundaries are obliterated or otherwise unascertainable, was inconsistent with the principle on which the law of accretion is founded, and following the decision in *In re Hull & Selby Ry. Co.*,[2] held that if land is gradually encroached upon by water, it ceases to belong to the former owner, even though such land may be identified and its boundary ascertained. The law is thus stated in the very learned and valuable judgment of Lindley, J. :—

"Gradual accretions of land from water belong to the owner of the land gradually added to: *Rex* v. *Yarborough*[3] and, conversely, land gradually encroached upon by water, ceases to belong to the former owner: *In re Hull & Selby. Ry. Co.*[4] The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history of the law shews this to be the case. Our own law may be traced back through Blackstone,[5] Hale,[6] Britton,[7] Fleta,[8] and Bracton,[9] to the Institutes of Justinian,[10] from which Bracton evidently took his exposition of the subject. Indeed, the general doctrine, and its application to non-tidal and non-navigable rivers in cases where the old boundaries are not known, was scarcely contested by the counsel for the defendant, and is well settled: see the authorities above cited. But it was contended that the doctrine does not apply to such rivers where the boundaries are not lost: and passages in Britton,[11] in the Year Books,[12] and in Hale, De Iure Maris[13], were referred to in support of this view: *Ford* v. *Lacey*,[14] was also relied upon in support of this distinction. Brit-

[1] De Iure Maris, p. 1, c. 1, Hargrave's Law Tracts, 6.
[2] 5 M. & W., 327.
[3] 3 B. & C. 91; 5 Bing. 163.
[4] 5 M. & W. 327.
[5] Vol. ii. c. 16, pp. 261, 262.
[6] De Iure Maris, cc. 1, 6.
[7] Bk. ii c. 2.
[8] Bk. iii. c. 2, §§ 6, &c.
[9] Bk. ii. c. 2.
[10] Inst. ii. 1. 20.
[11] *Supra.*
[12] 22 Ass. p. 106, pl. 93.
[13] Bk. i. c. 1, citing 22 Ass. pl. 93.
[14] 7 H. & N. 151.

ton lays down as a general rule that gradual encroachments of a river enure to the benefit of the owner of the bed of the river: but he qualifies this doctrine by adding, 'if certain boundaries are not found.' The same qualification is found in 22 Ass. pl. 93, which case is referred to in Hale, ubi supra. But, curiously enough, this qualification is omitted by Callis in his statement of the same case: see Callis, p. 51, and on its being brought to the attention of the Court in *In re Hull and Selby Ry. Co.*,[1] the Court declined to recognise it, and treated it as inconsistent with the principle on which the law of accretion rests. Lord Tenterden's observations in *Rex* v. *Yarborough*[2] are also in accordance with this view; and, although Lord Chelmsford in *Attorney-General* v. *Chambers*[3] doubted whether when the old boundaries could be ascertained, the doctrine of accretion could be applied, he did not overrule the decision of *In re Hull and Selby Ry. Co.*,[4] which decided the point so far as encroachments by the sea are concerned.

"Upon such a question as this I am wholly unable to see any difference between tidal and non-tidal or navigable and non-navigable rivers: and Lord Hale himself says there is no difference in this respect between the sea and its arms and other waters: De Iure Maris, p. 6. The question does not depend on any doctrine peculiar to the royal prerogative, but on the more general reasons to which I have alluded above. In *Ford* v. *Lacey*,[5] the ownership of the land in dispute was determined rather by the evidence of continuous acts of ownership since the bed of the river had changed, than by reference to the doctrine of gradual accretion, and I do not regard that case as throwing any real light on the question I am considering."[6]

Whether rule of alluvion applies to grants of land in the United States bounded by 'sectional lines.'—Not altogether dissimilar to the point I have just noticed is the question propounded, and discussed with remarkable ability and thorough-going research, by Mr. Houck in his treatise on the Law of Navigable Rivers, where he maintains that in America grants of land bounded by 'sectional lines,' measured and

[1] 5 M. & W. 327.
[2] 3 B. & C. 106.
[3] 4 De G. & J. 69-71.
[4] 5 M. & W. 327.
[5] 7 H. & N. 151.

[6] The qualification *viz.*, 'and the old margin of the river or stream cannot be distinctly traced,' contained in draft sections 22 and 23 drawn by Mr. Monahan is inconsistent with the rule laid down in *Foster* v. *Wright*, *supra*, and is apparently based upon the observation of Lord Chelmsford in *Attorney-General* v. *Chambers*, *supra*. Monahan's Method of Law, 196, sections 22, 23.

sold by the acre should, in all respects, be placed upon the same footing as the agri limitati of the Roman law, that they are limited towards the river by mathematical lines of survey run on the top of the bank and do not extend to the edge of the water; that if, under the Roman law, owners of agri limitati are not entitled to accretion by alluvion, there is no reason why the grantees of such 'fractional sections'—by which term these grants are known in America—should be entitled to the same right. "The right of alluvion," says the learned author, "is dependent upon the contiguity of the estate to the water. The water cannot add anything to property which it does not touch. If the lines bounding a fractional section, therefore, mean anything, they limit the rights of the purchaser; and no alluvion can attach to such fractions because not bounded by the water, but by mathematical lines. The objection that the space between the lines and the river is small, and of no benefit to the Government, and that, therefore, it ought to go to the grantee, is of no force. If the Government sells nine hundred and ninety-nine acres out of a thousand, the remaining one acre still remains the property of the Government."[1] But this argument has not met with the approval of the Supreme Court of the United States, which in *Railroad Co.* v. *Schurmeir*,[2] followed subsequently in a long series of cases,[3] has held that these mathematical lines or 'meander lines', as they are called, are employed not as boundaries of the 'fraction,' but as a means of defining the sinuosities of the river banks and of ascertaining the quantity of land comprised in the fraction; that in these cases the right of the grantee extends up to the edge of the water, and that therefore they are entitled to all accretions by alluvion.

It seems to follow as a corollary from the principle of accretion, that if a riparian proprietor sells a portion of his estate reserving to himself a strip along the whole length of the river frontage, such purchaser is not entitled to any increment by alluvion, because his estate is not in contact with the water.[4]

Nature of right acquired in increments by alluvion.—Accretions by alluvion acquire the legal character of the land to which they adhere. If the lord of a manor is entitled to land bordering on the sea or a river as part of his demesne, that is to say, as a freehold land

[1] Houck on Navigable Rivers, § 251.

[2] 7 Wall. 272, cited in Gould on Waters §§ 76-78.

[3] Cited in Gould on Waters, § 76 (notes.)

[4] Houck on Navigable Rivers, § 257.

in his own occupation, the accretions annexed thereto will become his absolutely; if such land be a copyhold tenement, and its boundary is not otherwise limited than by the sea or by the river, then the copyholder acquires the same copyhold interest in the accretion as he has in the adjoining tenement, and the lord of the manor acquires a bare freehold interest in it, subject to the right of the copyholder; and if such land is part of the waste of the manor, the right of the lord to the accretions will be subject to the rights of the tenants for commonage, and in the waste.[1]

It is also an obvious deduction from the same principle that, if a public highway extends across the shore to navigable water, it would continue to be prolonged up to the edge of the water according as the shore receded in consequence of accretions.[2]

It has been held in America that, if a city is the owner of a quay or river bank, it is entitled like any private littoral or riparian owner, to alluvial increments annexed thereto; and similarly, if an embankment is lawfully constructed by a city along the margin of waters which are the property of the state up to high-water mark, it becomes the artificial boundary of the adjoining private properties, and the city acquires a title to accretions which are subsequently added.[3]

Apportionment of alluvion amongst competing frontagers.—Accretions by alluvion sometimes form in front of the lands of two or more littoral or riparian proprietors. In such cases a somewhat difficult problem sometimes occurs as to what is the proper method of apportioning them amongst such proprietors. The question does not appear to have arisen in England,[4]

1 Hall on the Seashore, (2nd ed.), 112-114; Morris' Hist. of the Foreshore, 788-790; Phear on Rights of Water, 43; Hunt on Boundaries (3rd ed.), 34.

2 Gould on Waters, § 157.

3 *Ibid.*

4 Although the exact question has not yet arisen in England, yet the decision of the Court of Appeal in *Crook* v. *Corporation of Seaford* (L. R. 6 Ch. App) 551 indicates somewhat the rule which the Courts there would be inclined to adopt if such question arose before them. In that case the plaintiff claimed against the defendant Municipal Corporation, specific performance of an agreement to let out to him the flat part of the beach opposite to his field, and it was contended on his behalf that he was entitled to a lease of the whole of the beach comprised between lines drawn in prolongation of the sides of his field, but the Court held that the boundaries of the piece of land agreed to be demised were lines drawn from the extremities of the plaintiff's field perpendicular to the coast line.

The method of apportionment of what are called the 'superfluous lands' (such portions of lands acquired by Railway Companies under their statutory powers as are more than what is

but it has arisen in America, and has been very carefully discussed in numerous cases by the Courts in that country, chiefly in connection with the apportionment of flats-ground or the beach, that is, the shore between high and low-water mark, amongst the adjoining littoral proprietors in the states of Massachusetts and Maine.[1] Alluvial formations obviously stand on precisely the same footing as flats-ground, as regards the mode of their apportionment. The question resolves itself into a problem of geometry in each case, depending for its solution mainly upon two general considerations which must always be kept in view, namely, to give to each proprietor a fair share of the land, and to secure to him convenient access to the water from all parts of his land by giving him a share of the new frontage in proportion to the extent of his old frontage.[2] What the extent of the property of each frontager back from the shore or bank is, whether it consists of a deep parcel or a mere strip, is wholly immaterial. It is also manifest that the rule of apportionment must be the same whether the accretion is gained from the sea, a tidal navigable river or a private stream.

If the configuration of the shore or river bank approximates to a straight line, the problem is easy enough; because then the apportionment can be made by drawing straight lines from the terminals of the boundaries of the several riparian or littoral estates at right angles to the

wanted for the construction of their line and other works, and which, unless sold by them within a certain time, vest in and become the property of the owners of the adjoining lands, in proportion to the extent of their lands respectively bordering on the same, under s. 127 of the Lands Clauses Consolidation Act, 1845) amongst the adjoining owners adopted in England may be regarded as the nearest approximation to what, according to the law of that country, would be a fair mode of division of alluvial land amongst competing frontagers.

In *Moody* v. *Corbett*, (5 B. & S. 859; L. R. 1 Q. B. 510; see also *Smith* v. *Smith*, L. R. 3 Ex. 282) the Court of Queen's Bench held that superfluous lands should be apportioned among the owners of the adjoining lands, not according to the depth of their land or the limits of the frontage of such land, but by drawing a straight line from the point where the boundaries of two adjoining owners meet to the nearest point on the farthest limit of such superfluous land; but on appeal the Exchequer Chamber was of opinion that where there are several adjoining properties in contact with the superfluous land, it should be divided among the owners of such adjoining properties *in proportion to the frontages of each*, meaning by frontage what would be the length of the line of contact of each property, if such line was made straight from the point of intersection of the boundaries on one side to the point of intersection of the boundaries on the other. This is precisely the method of division of alluvions followed in America.

[1] Angell on Watercourses (7th ed.), § 56.

[2] Gould on Waters, § 163.

general course of the original bank or of the original high-water mark of the shore.

But, if the general course of the shore or river bank curves or bends, the problem assumes a more difficult aspect. The general rule of apportionment which has been adopted in America in such cases is to measure the whole extent of the old shore or river line to which the accretion attaches; then to divide the new shore or river line into equal parts corresponding in number to the feet or rods of which the old shore or river line is found to consist by such measurement; and after allotting to each proprietor as many of these parts as he owned feet or rods on the old line, to draw lines from the original terminals of the boundaries of each littoral or riparian property to the points of division on the new line. If, for example, the shore or river line of two conterminous properties owned by A and B before the formation of alluvion, was 200 rods in length, A's share being 150 rods and B's 50, and the newly formed line is but 100 rods in length, then A would take 75 rods, and B 25 rods of that line, and the division of the accretion would be made by drawing a line from the extremity of the boundary line between the two properties to the point thus determined on the new line.[1] The dividing lines will diverge or converge and each proprietor will consequently have a greater or a less frontage on the new water line than he had on the old, according as the new shore or river line forms a convex or a concave curve against the water.[2]

This rule is to be modified under certain circumstances, namely, where the shore or river line is elongated by deep indentations or sharp projections, its length should be reduced by equitable and judicious estimate, and the general available line ought to be taken before it is employed in making the apportionment.[3]

The rule for the apportionment of accretions by alluvion is, as I have said, practically the same as that which governs the apportionment of beach, flats-ground or flats; and in America when flats lie in a cove or re-

[1] Angell on Watercourses (7th ed.), § 55; Gould on Waters, § 163. This rule is taken from Denisart. See note A at the end of the lecture, p. 176, *infra*.

[2] Gould on Waters, § 163, *in fin.* It is perhaps more correct to say, 'according as the new shore or river line is greater or less than the old shore or river line in length,' for the dividing lines will be equally divergent, whether the new shore or river line forms a convex or a concave curve against the water, if only the *length* of such curves happen to be greater than the length of the old shore or river line.

[3] Angell on Watercourses (7th ed.) § 55; Gould on Waters, § 164.

cess, the mouth of which is wide enough, they are apportioned by drawing parallel lines from the extremities of the divisional lines of the littoral properties perpendicular to an imaginary base line run across the mouth of the cove from headland to headland; but where the mouth of the cove is so narrow that it is impossible to make the apportionment by drawing such parallel lines, the apportionment is made by drawing converging lines from the extremities of the divisional lines of the littoral properties to points upon an imaginary base line run as above, such points being determined by giving to each proprietor a width upon the base line proportional to the width of his shore line. If a cove or inlet is so irregular in outline and so traversed by crooked channels, that none of the rules that have been stated are applicable, the only course is to apportion the flats in such manner as to give to each proprietor a fair and equal proportion by as near an approximation to these rules as is practicable.[1]

A rule somewhat different from any of those that I have already mentioned, was adopted in the case of *Thornton* v. *Grant*,[2] in Rhode Island, where the question arose with reference to the extent of the water frontage of two conterminous littoral proprietors, it being alleged that the defendant was so constructing a wharf in front of his premises as to encroach upon the plaintiff's water frontage, although the wharf did not actully project beyond the divisional line prolonged to the edge of the water at low-water mark. Durfee, J., in delivering the opinion of the Court, after referring to the above rules, said:—

"In the case before us we are not called upon to partition alluvion or flats, but to determine the extent of the plaintiff's water front. The principle involved, however, is very much the same in the one case as in the other; and we are therefore not insensible to the guidance to be derived from the decisions cited. But these decisions do not establish any one invariable rule, and it is quite evident that no one of the several rules which they do suggest could be applied in all cases without sometimes working serious injustice. In the case at bar a solid rock projecting out to the main channel has preserved the shore of the plaintiffs from detrition at that point, but has allowed quite a deep inward curve beyond that point, while the shore of the defendants, having no such protection, has conformed more to the course of the river. The consequence is, that

[1] Gould on Waters, § 164; Angell on Watercourses (7th ed.), § 56.

[2] 10 R. J. (477), 489, cited in Gould on Waters, § 165.

if we draw a front line from headland to headland, and then draw the division line so as to give to each set of proprietors a length of front line proportionate to the length of their original shore, the division line will pass diagonally across what would ordinarily be regarded as the water front of the defendant's land. This is a result which does not commend itself to us as either reasonable or just. We have decided upon another rule, which to us seems equitable, and which, for our present purposes, in the circumstances of this case, leads to a pretty satisfactory result. The rule is this: Draw a line along the main channel in the direction of the general course of the current in front of the two estates, and from the line so drawn, and at right angles with it, draw a line to meet the original division line on the shore. This rule is not unlike the rule adopted in *Gray* v. *Deluce*.[1] It will give the plaintiffs as large an extent of water front as we are disposed to allow them; and upon the front so defined we will grant them an injunction to prevent the defendant from encroachments."

II. **Dereliction.**—In the phraseology of English law the expression dereliction is generally used in modern times[2], in preference to the term reliction used by the American lawyers[3] (borrowed apparently from the relictio of the Civil law), to denote a sudden and perceptible shrinking or retreat of the sea, or of a river, and derelict land is used to denote land suddenly, and by evident marks and bounds, left uncovered by water.[4]

Ownership of lands abandoned by the sea or a tidal navigable river.—Lord Hale says:—"Now as touching the accession of land per recessum maris, or a sudden retreat of the sea, such there have been in many ages &c.

"This accession of land, in this eminent and sudden manner by the recess of the sea, doth not come under the former title of alluvio, or increase per projectionem; and therefore, if an information of intrusion be laid for so much land relict per mare, it is no good defence against the king to make title per consuetudinem patriae to the marettum, or sabulonem per mare projectum; for it is an acquest of another nature &c.

"And yet the true reason of it is, because the soil under the water must needs be of the same propriety as it is when it is covered with

1 5 Cush. 9.

2 "Reliction" is used by Lord Hale and Mr. Schultes.

3 Angell on Watercourses (7th ed.), § 57.

4 Hall on the Seashore (2nd ed.), 115, 129; Morris' Hist. of the Foreshore, 791, 803; Angell on Watercourses (7th ed.), § 57; Hunt on Boundaries (3rd ed.), 30.

water. If the soil of the sea, while it is covered with water, be the king's, it cannot become the subject's because the water hath left it."[1]

Then after citing some authorities, he continues:—

"But a subject may possess a navigable river, or creek or arm of the sea; because these may lie within the extent of his possession and acquest.

"The consequence of this is; that the soil relinquished by such arms of the sea, ports or creeks; nay, though they should be wholly dried or stopped up; yet such soil would belong to the owner or proprietor of that arm of the sea, or river, or creek: for here is not any new acquest by the reliction; but the soil covered with water was the subject's before, and also the water itself that covered it; and it is so now that it is dried up, or hath relinquished his channel or part of it."[2]

From this it is clear that in the case of dereliction, the ownership of the derelict land follows the ownership of the bed while it was covered with water. Accordingly, if the derelict land is a portion of the bed of the sea or of a tidal navigable river, in England it primâ facie belongs to the Crown;[3] but if a districtus maris or a portion of the bed of a tidal navigable river within certain boundaries belongs to a subject, whether under a charter, or grant, or by prescription, it continues to be his property if the water retires from it suddenly.[4]

This is also the rule in those states in America which have adopted the Common law distinction between tidal and non-tidal rivers. But in those states where the ownership of the bed of a river is determined by its navigability or non-navigability in fact, derelict land forming part of the bed of a navigable river primâ facie belongs to the state, and where it is a part of the bed of a non-navigable stream, it belongs to the adjacent riparian owner.[5] The ownership of land relicted by the sea is of course the same in all the states.

[1] Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 30, 31; Morris' Hist. of the Foreshore, 397-399.

[2] Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 32; Morris' Hist. of the Foreshore, 399. Cf. *Ibid.* 381.

[3] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 14; Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 30, 31; Schultes on Aquatic Rights, 121; Woolrych on Waters, (2nd ed.), 46.

[4] Hunt on Boundaries (3rd ed.), 34. See Hall's remarks in his Essay on the Seashore (2nd ed.), 142, 143.

[5] Gould on Waters, § 158.

Effect of inundation on the ownership of lands.—For similar reasons, if the sea, or a tidal navigable river owned by the Crown suddenly overflows the lands of private individuals, and landmarks, maps, mines under the sea, or even the evidence of witnesses, afford certain means of identifying such lands, they remain the property of the former owners as well during submergence as afterwards; and the right of the Crown does not attach thereto when the sea or the river retires and leaves them dry, although the overflow may have continued for such length of time as not only to deface all marks or signs of the lands, but also to render them completely a part of the sea or of the river.[1]

In America, the rule is precisely the same.[2]

"If a subject," says Lord Hale, "hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety: and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B. though the inundation continue forty years,"

"If the marks remain or continue, or extent can reasonably be certain, the case is clear.—Vide Dy. 326.—22 Ass. 93."[3]

The same view is thus expressed by him in another passage in the same treatise:—

"It is true, here were the old bounds or marks continuing, *viz.*, the Hedgewood. But suppose the inundation of the sea deface the marks and boundaries, yet if the certain extent or contents from the land not overflown can be evidenced, though the bounds be defaced, yet it shall be returned to the owner, according to those quantities and extents that it formerly had. Only if any man be at the charge of inning of it, it seems by a decree of Sewers he may hold it till he be reimbursed his charges, as was done in the case of Burnell before alledged. But if it be

[1] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 15; Black. Comm. 262; Viner's Abr. Prerog. B. a 2; Comyns' Dig. Prerog. D. 62; Schultes on Aquatic Rights, 122, (Schultes observes that, according to Herodotus, this was the law among the Egyptians too); Hall on the Seashore (2nd ed.), 129-130; Hunt on Boundaries (3rd ed.), 35; Coulson & Forbes' Law of Waters, 23, 62.

[2] Gould on Waters, § 158.

[3] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 15; Morris' Hist. of the Foreshore, 381.

freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time become part of the sea, and within the admiral's jurisdiction while it so continues."[1]

Callis puts this case—"The sea overflows a field where divers men's grounds lie promiscuously, and there continueth so long, that the same is accounted parcel of the sea; and then after many years the sea goes back and leaves the same, but the grounds are so defaced as the bounds thereof be clean extinct, and grown out of knowledge, it may be that the king shall have those grounds; yet in histories I find that Nilus every year so overflows the grounds adjoining, that their bounds are defaced thereby, yet they are able to set them out by the art of geometry."[2]

Effect of sudden change of the bed of a river on ownership of lands newly occupied.—If a river, whether tidal or non-tidal, navigable or non-navigable, instead of shifting its natural channel laterally by the gradual and insensible erosion of any of its shores or banks, suddenly forsakes it altogether, and by the incursion of its waters forms an entirely new bed, in the lands of a private individual, the right to the soil of the new bed remains in him as before, and he acquires an exclusive right of fishery in the new channel, subject, though it may be, in some cases, to the right of navigation on the part of the public.[3]

The point was raised in the case of the *Mayor* of *Carlisle* v. *Graham*,[4] which was an action for trespass to plaintiff's several fishery in the navigable tidal river Eden, such fishery having been derived under a grant from the Crown. It appeared that about the year 1693 the river began to leave its former bed where plaintiff's fishery was situate, and to flow down a channel which was formerly a ditch on the land of the Earl of Lonsdale, under whom defendants claimed. The plaintiffs claimed to have the several fishery in the new channel, but the Court held, that the right of the Crown to grant a several fishery in a tidal river depends on its proprietorship of the bed, and that the bed in this case remained, as before, the property of the former owner. Kelly, C. B., delivering the

[1] Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 16; Morris' Hist. of the Foreshore, 383.

[2] Callis on Sewers, 51.

[3] Schultes on Aquatic Rights, 122; Woolrych on Waters (2nd ed.), 47; Gould on Waters, § 159; *Miller* v. *Little*, L. R. 2 Ir. 304; *Mayor of Carlisle* v. *Graham*, L. R., 4 Ex. 361.

[4] L. R. 4 Ex. 361

judgment of the Court, said :—" All the authorities ancient and modern are uniform to the effect that, if by the irruption of the waters of a tidal river, an entirely new channel is formed in the land of a subject, although the rights of the Crown and of the public may come into existence, and be exercised in what has thus become a portion of a tidal river, the right to the soil remains in the owner, so that if at any time thereafter the waters should recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner free from all rights whatsoever in the Crown or in the public."[1]

Custom as to medium filum of Severn being the common boundary between opposite littoral manors.—A custom, apparently founded upon the principle which we have just now considered, is recorded by Lord Hale in his De Iure Maris,[2] according to which the filum aquae or the middle thread of the river Severn, a tidal navigable river, forms in that portion of its course which lies between Gloucester and Bristol, the common though fluctuating boundary between the manors on either side, according as the river shifts its channel from time to time. It is important to bear this instance in mind, as being the English counterpart of a custom more generally prevalent in India, chiefly on the banks of rivers in the Punjab.

In England, derelict land cannot , as a general rule, be claimed by a subject or the lord of a manor by custom ;[3] but it may be claimed under a grant from the Crown or by prescription; and if a creek, arm of the sea or other districtus maris has been acquired by such grant or by prescription, the land derelicted within the known boundaries of such districtus maris belongs to the owner of the districtus maris, provided, however, in the case where the title is claimed by prescription, it is shewn that the prescription extends to a right of property in the soil, and not merely to an incorporeal franchise.[4]

Border instances between alluvion and dereliction —On the borderland between alluvion and dereliction, a question of some nicety, and sometimes of practical difficulty too, may arise where, for instance, the

[1] *Cf.* Hale, de Iure Maris, in Hargrave's Law Tracts, 5, 6, 13, 16, 37, *Reg.* v. *Betts.* 16 Q. B. 1022.

[2] Hale, de Iure Maris, p. 1. cc. 1, 5, 6; Hargrave's Law Tracts, 6, 16, 34; see also Lord Hale's First Treatise, printed in Morris' Hist. of the Foreshore, 353-354.

[3] 1 Keb. 301. For an instance of a local custom entitling lords of manors to derelict lands, cf. *Attorney-General* v. *Turner*, 2 Mod. 107.

[4] 6 Bacon's Abr. t. Prerog. 400; Hale, de Iure Maris, cc. 4, 6; Hunt on Boundaries, (3rd ed.), 34.

sea gradually heaps up a bar to itself across a marshy arm or inlet of the sea, the communication between the sea and the inlet gradually decreasing until at last the entrance is quite blocked up, and the inlet becomes a lake or pond, which afterwards by evaporation and drainage, natural or artificial, becomes dry land; or where, for instance, a navigable river suddenly shifts its main channel leaving on a portion of its old bed an arm or branch of its own, more or less stagnant, and separated from the main channel by a long stretch of sandbank, and such branch or arm gradually becomes closed at both ends until it becomes a lake, which at last silts up in the same way as it does in the case of an arm or inlet of the sea. Does such an 'acquest' belong to the Crown or to the owner of the adjacent land? Is it to be regarded as derelict land or as an alluvial accretion?

There can be no doubt that so long as the communication between the arm or inlet and the sea or the main channel of the river is not actually shut out, the soil of such arm or inlet continues to be part of the public domain, and as such belongs to the Crown. It is equally clear that the owner of the adjacent land becomes entitled iure alluvionis at least to so much of the uncovered or dry soil as is gradually added thereto by the slow and insensible decrease of the water of the arm or inlet, between the time that the closure of its communication with the sea or the main channel of the river first commences until such communication finally ceases. At this period of final exclusion of the sea or of the river what was an arm or inlet before, becomes transformed into a lake or pond. Such period, therefore, must be regarded as the punctum temporis with reference to which the right of the Crown or of the adjacent owner to the 'acquest' must be determined. If the formation of the bed of the arm or inlet be such, that as its communication with the sea or the main channel of the river gradually diminishes, the bed of such arm or inlet also gradually silts up, and that to such an extent that at the moment when the communication finally ceases, the whole bed is uncovered or becomes dry, it ought to be deemed an accretion annexed to the adjacent soil by *alluvion* and therefore belonging to the owner of it. But if, on the other hand, the formation of the bed of the arm or inlet be such, that at the time when its communication with the sea or the main channel of the river finally stops, such arm or inlet becomes a lake or pond; then, as the right to the lake or pond at the time of such final cessation of communication must vest in somebody, and as such lake or pond cannot

be regarded as an accretion by alluvion to the adjacent soil, it must vest in the Crown. The right of the Crown to such lake or pond may also be supported on the ground that the final exclusion of the sea or the river and the consequent transformation of the arm or inlet into a lake or pond was not a gradual but a sudden event.

Such peculiar cases, however, as these, must depend upon circumstances disclosed in the evidence, the general criterion for determining the ownership of the 'acquest' in each case being, whether the fluvial change which caused it was gradual and insensible or sudden and manifest.

III. Islands.—Ownership of islands.—An island rising up in the sea or in a tidal navigable river, primâ facie belongs by Common law to the Crown,[1] and in America, to the respective states, which have adopted the rule of the Common law with respect to the ownership of the bed of such river. The same rule is equally applicable to an island rising in a non-tidal but navigable river, in those states in America where the bed of such river belongs to the state.[2] In short, the ownership of islands thrown up in the sea or in a river depends on the ownership of the soil on which they rest[3], and is governed by the same rule as that which regulates acquisitions by dereliction. An island is generally formed either by the recession or sinking of the water or by the accumulation or agglomeration of sand and earth on the bed, which becomes in process of time solid land environed with water. In either case the island is part of the soil of the bed of the sea or river, and its proprietorship must therefore necessarily follow the proprietorship of the bed. There is a third mode in which an island may be formed, namely, when an arm of the sea divides itself and encompasses the land of a private owner; in such case, the ownership of the land, though now transformed into an island, remains in him as before.[4]

It follows from the reason I have just indicated that, where a dis-

[1] Bracton, lib. ii. c. 2. § 2; Fleta, lib. iii. c. 2. § 9; Hale, de Iure Maris, p. 1. cc. 5, 6; Hargrave's Law Tracts, 17, 36; Callis on Sewers, 45, 47; Schultes on Aquatic Rights 117; Hall on the Seashore (2nd ed.), 140-142; Phear on Rights of Water, 11, 44; Jerwood on Seashore, 189; Woolrych on Waters (2nd ed.) 36, 37.

[2] Angell on Tide Waters, 267; Houck on Navigable Rivers, § 264-269; Gould on Waters, § 166.

[3] Monahan's Method of Law, 197, sec. 25.

[4] Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 37; Schultes on Aquatic Rights, 120; Woolrych on Waters (2nd ed.), 37.

trictus maris, or a portion of the bed of a tidal navigable river belongs to a subject, either by charter or prescription, an island which rises within the known metes and bounds of such private property will also belong to him.

Lord Hale thus lays down the law with regard to islands in the De Iure Maris :—

"As touching islands arising in the sea, or in the arms or creeks or havens thereof, the same rule holds, which is before observed touching acquests by the reliction or recess of the sea, or such arms or creeks thereof. Of common right and primâ facie, it is true, they belong to the Crown, but where the interest of such districtus maris, or arm of the sea or creek or haven, doth in point of propriety belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject, will belong to the subject according to the limits and extents of such propriety. And therefore if the west side of such an arm of the sea belong to a manor of the west side, and an island happen to arise on the west side of the filum aquae environed with the water, the propriety of such island will entirely belong to the lord of that manor of the west side; and if the east side of such an arm of the sea belong to a manor of the east side usque filum aquae, and an island happen between the east side of the river and the filum aquae, it will belong to the lord on the east side; and if the filum aquae divide itself, and one part take the east and the other the west, and leave an island in the middle between both the fila, the one half will belong to the one lord, and the other to the other. But this is to be understood of islands that are newly made; for if a part of an arm of the sea by a new recess from his ancient channel encompass the land of another man, his propriety continues unaltered. And with these diversities agrees the law at this day, and Bracton, lib. 2. cap. 2. and the very texts of the civil law. For the propriety of such a new accrued island follows the propriety of the soil, before it came to be produced."[1]

IV. Avulsion.—Where the impetuosity of a river dissevers a portion of the land of a private individual and transports it to the land of another, it remains the property of the former owner, unless he abstains from taking possession of it for so long that it cements and coalesces

[1] Hale, de Iure Maris, p. 1. c. 6; Hargrave's Law Tracts, 36, 37; Morris' Hist. of the Foreshore, 405. *Cf.* Hale, de Iure Maris, p. 1. c. 4; Hargrave's Law Tracts, 17; Morris Hist. of the Foreshore, 383.

with the land of the other person. This is called title by avulsion,[1]—a species of acquisition dealt with by Bracton, Fleta, Blackstone, and other subsequent text writers, but never judicially discussed, probably because no case of the kind has ever arisen.

B. Incrementa Fluvialia.

I. Alluvion.—The principles which govern the ownership of accretions gained by alluvion from private streams, and the modes of their application to varying circumstances, are obviously the same as those which I have already discussed in my observations concerning the sea and public navigable rivers.[2]

II. Dereliction.—Ownership of derelict beds.—Land left dry by the sudden dereliction of a portion of the bed of a private river or stream belongs to the owners of the adjacent soil and not to the Crown, because the ownership of such bed was in the adjacent riparian owners while it was covered with water. Where the whole bed of such private river or stream dries up by sudden dereliction, then, inasmuch as the bed of such river or stream, as explained in a previous lecture,[3] belongs to the riparian proprietor on each side up to the middle thread of the stream, such derelict land is divided between them equally; and where there are several riparian proprietors on each side of the stream, the derelict land on each side of the middle thread is divided amongst the riparian proprietors on that side only, according to the extent of their respective riparian frontages, the middle thread in each case being the middle line between the banks of the river or stream when the water is in its natural and ordinary stage, without regard to the channel or deepest part of the stream.[4]

Effect of sudden or gradual change of the bed of a stream on the position of the boundary line between conterminous proprietors.—For similar reasons, land suddenly overflowed by the waters of a private river or stream remains after subsidence or recession of the waters, as it did before, the property of its former owner, and the original medium filum continues to mark the common boundary between opposite riparian estates.[5]

[1] Bracton. lib. ii. c. 2. § 1; Fleta, lib. iii. 2. c. 2. § 6; Schultes on Aquatic Rights 116; Houck on Navigable Rivers, § 270; 2 Black. Com. 262; Angell on Watercourses (7th ed.), § 67; Woolrych on Waters (2nd ed.), 36, 47.

[2] *Cf.* Angell on Watercourses (7th ed.), § 53.

[3] *Supra*, 92.

[4] Schultes on Aquatic Rights, 121; Angell on Watercourses (7th ed), §§ 57, 58.

[5] Schultes on Aquatic Rights, 122; Hunt on Boundaries (3rd ed), 37; *Ford* v. *Lacey*, 7 H. & N. 151; 7 Jur N. S 684.

If a private river or stream slowly and imperceptibly changes its course, the medium filum of the new channel becomes the boundary line between opposite riparian properties; but if the change is sudden and manifest, as for instance, when it arises from a freshet, the original medium filum continues to mark the boundary between them.[1]

III. Islands.—The right to the ownership of islands formed in a private river or stream depends, as in the case of land left dry by sudden dereliction, upon the ownership of the bed[2]; consequently, the ownership of an island varies according to the situation of it with reference to the middle thread of the river or stream. If it lies wholly on one side of the middle thread, it belongs exclusively to the riparian proprietor on that side; if it rises exactly in the middle of the river or stream, it is divided between opposite riparian proprietors by the middle thread; but if it so forms that it lies nearer to one side of the river or stream than to the other, the apportionment amongst opposite riparian proprietors is still made by the middle thread, with the result, however, that a greater portion of the island is given to the nearer riparian proprietor than to the riparian proprietor on the opposite side. If the island lies in front of the lands of several riparian proprietors on each side, the division is made according to the extent of their respective riparian frontages.[3]

These rules, therefore, are substantially the same as those which have been laid down by the Roman Civil law on this topic, and which we have already discussed in the last lecture.[4]

The rules on this subject, however, are more definitely laid down in the code of Louisiana. They are as follows:—"Islands and sand-bars, which are formed in streams not navigable, belong to the riparian proprietors and are divided among them according to the rules prescribed in the following articles: If the island be formed in the middle of the stream, it belongs to the riparian proprietors whose lands are situated opposite the island. If they wish to divide it, it must be divided by a line supposed to be drawn along the middle of the river. The riparian

[1] Hale, de Iure Maris, p. 1. c. 1; Hargrave's Law Tracts, 5, 6; *Ford* v. *Lacey*, 7 H. & N. 151; 7 Jur. N. S. 684; *Foster* v. *Wright*, 4 C. P. D. 438; Gould on Waters, § 159; Hunt on Boundaries (3rd ed.), 37; Angell on Watercourses, (7th ed.), § 53; Monahan's Method of Law, 196, secs. 24, 25, (the second part of the section is opposed to *Foster* v. *Wright*).

[2] Monahan's Method of Law, 197, sec. 26.

[3] Angell on Watercourses (7th ed.), § 44; Gould on Waters, § 166; Hunt on Boundaries, (3rd ed.), 29.

[4] *Supra*, 123, 126.

proprietors then severally take the portion of the island which is opposite their land, in proportion to the front they respectively have on the stream, opposite the island. If, on the contrary, the island lie on one of the sides of the line thus supposed to be drawn, it belongs to the riparian proprietors on the side on which the island is, and must be divided among them, in proportion to the front they respectively have on the stream, opposite the island."[1]

Mode of division of a second island formed between the first and the opposite mainland.—An interesting question sometimes occurs where, after the formation of an island, a second island appears between the first and the opposite mainland; or where the extent of the right of fishery of opposite riparian proprietors, which in a private river generally does, and in a public navigable river may by special local usage, extend up to the middle thread, has to be determined after the formation of an island.

The latter point arose in *Earl of Zetland* v. *The Glover Incorporation of Perth*,[2] with regard to the extent of the right of fishing in the river Tay in Scotland, in which, although it was a public navigable river, the right of fishing belonged by special local usage to the riparian proprietors usque medium filum. There a drifting island had sprung up in the channel so as to impede or embarrass the exercise of the right of fishing by the Earl of Zetland, one of the riparian proprietors; and it was contended on his behalf that, as it was nearer his side of the river, his right of fishery extended up to the middle thread of that branch of the river, which lay between the further side of the island and the opposite mainland. But the House of Lords held that the island was to be reckoned as part of the bed of the river and that the middle thread was the middle line between the original banks. Lord Westbury said that, if the island had become annexed to the bank so as to form a permanent accretion, there would have been a new medium filum.

The former point arose in Massachusetts in America, in *Trustees of Hopkins Academy* v. *Dickinson*,[3] where Chief Justice Shaw laid down that the filum aquae, which should determine the ownership of the second island rising in a private stream, is not the original middle thread but the new middle thread of the channel between the first island and the river bank on the side on which the second island rises. He thus discussed the point in his judgment:—

[1] Angell on Watercourses, (7th ed.), § 45. [2] L. R. 2 H. L. Sc. 70.

[3] 9 Cush. 544, 547-550, cited in Angell on Watercourses, (7th ed.), § 48 a. *Cf.* Gould on Waters § 166.

"Assuming the thread of the stream as it was immediately before such land made its appearance, this rule assigns the whole island, or bare ground formed in the bed of the river, if it be wholly on one side of the thread of the river, to the owner on that side; but if it be so situated that it is partly on one side and partly on the other of the thread of the river, it shall be divided by such line,—*i. e.*, that line which was the thread of the river immediately before the rise of the island,—and held in severalty by the adjacent proprietors. But that line must thenceforth cease to be the thread of the river, or filum aquae, because the space it occupied has ceased to be covered with water. But, by the fact of an island being formed in the middle of the river, two streams are necessarily formed by the original river, dividing it into two branches. The island itself, having become solid land, forms itself a bank of the new stream on the one side, and the old bank on the main shore forms the other. And the same rule applies on the other side of the island. There must, then, be a filum aquae to each of these streams, whilst the old filum aquae is obliterated to the extent to which land has taken the place of water. But this island, having all the characteristics of land, may soon be divided and subdivided, by conveyances and descents, and all the modes of transmission of property known to the law, and thus become the property of different owners. Now suppose another island formed in one of these branches, between the first island and the original main shore. It seems to us that it must be divided upon the same principle as the first; but, in doing it, it will be necessary to assume as the filum aquae the middle line between the first island and the original river bank on that side. If this is a correct view of the practical consequences flowing from the adoption of the principle stated,—and it appears to us that it is,—an obvious difficulty presents itself, in making that line a fixed standard for the demarcation of the boundaries of real estates between conterminous proprietors, which is itself fluctuating and changeable. Perhaps a satisfactory answer to this may be found in the suggestion, that the rule is equitable, and as certain as the proverbially reliable nature of the subject-matter will admit; and, in adapting it to the varying circumstances of different cases, a steady regard must be had to the great principle of equity,—that of equality. This changing of the filum aquae seems not to be distinctly treated in any case; but it seems that it must necessarily occur in many cases. In addition to those already mentioned, suppose a river, by slow accretions or washing away,

widens or narrows on both sides as it may, but unequally, the filum aquae must change its actual line. Supposing an island dividing a river for some distance shall be wholly washed away, the filum aquae must shift and pass along a line which was formerly solid land."

Note A (*referred to in note* 1 *on p.* 162.)

Il faut, 1° mesurer toute l'étendue de l'ancien rivage et compter combien chaque riverain y possede de perches, de toises, ou de pieds de face. On doit compter par perches, toises ou pieds, selon que cela est nécessaire, pour éviter les fractions dans la mesure de chaque terrein en particulier.

2° On additione ces différentes quantités de toises, par exemple, que l'on a trouvées par l'opération précédente ; et en supposant que le total se monte à deux cens toises, on divise en deux cens parties égales le nouveau rivage de la riviere, et l'on destine à chaque co-partageant autant de portions de cette derniere rive qu'il possede de toises sur l'ancienne.

Alors, pour faire le partage, il ne reste plus que de tirer des lignes, qui partent des anciennes limites des héritages, et aboutissent aux points, qui, d'après ce que l'on vient de dire doivent servir de bornes aux différens domaines sur le bord de la riviere.

Les lignes tirées ainsi, du rivage ancien au rivage nouveau, seront tantôt paralleles, tantôt divergentes, tantôt convergentes, selon que la rive actuelle de la riviere aura une étendue pareille à celle de l'ancien rivage, ou moindre, ou plus grande. Il est facile de concevoir comment le cours d'une riviere peut s'allonger ou se raccourcir en changeant de direction.—Collection de Décisions Nouvelles par M. Denisart, tit. Attérissement.

In the Draft Civil Code of New York the rule of alluvion (including dereliction) is thus stated:—

§. 443. Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material, or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

N. B.—If the formation is sudden, it belongs to the state.

The rules contained in this Draft Code (§§ 444—448) with regard to the ownership of islands formed in navigable rivers and non-navigable streams, of islands formed by the division of streams, and of abandoned river-beds, as well as the rule relating to avulsion are similar to those laid down by the Code Napolean.

LECTURE VII.

ALLUVION AND DILUVION.—(*Continued*).

(*Anglo-Indian Law*).

The early Hindu law concerning alluvion—Text of Vrihaspati—Opinion submitted by the Hindu law officers to the Calcutta Sudder Dewanny Adawlut in 1814—Opinion of Mr. J. H. Harrington—Reported decisions prior to 1825—Enumeration of topics—I. Alluvion—Incrementum latens—Effect of the use of the expression 'gradual accession,' in Regulation XI of 1825, and of the omission therefrom of the expression 'imperceptible' —Rule of alluvion, in what cases applicable?—Precise nature of the rule of alluvion—Qualification upon that rule—What evidence insufficient to prove 'gradual accession'—The height which an alluvial formation must attain before it can form the subject of private right—Accretions resulting from artificial causes—Alluvion in beels or lakes—Apportionment of alluvial formations amongst competing frontagers—Provisions of the Indian Alluvion Bills of 1879 and 1881 respectively—Objections to which these provisions are open—Who are entitled to accretions by alluvion—Nature of interest acquirable in them—II. Dereliction—Real nature of dereliction—Gradual dereliction correlative to alluvion—Sudden dereliction of a portion of the bed of the sea or of a navigable river—Sudden dereliction of the bed of a non-navigable stream—Whether abandoned bed must be 'usable' before private right can accrue to it—Apportionment of abandoned river-bed—III. Islands—Ownership of islands formed by an arm of a river encircling a portion of the mainland—Provisions of Reg. XI of 1825 thereupon—Ownership of other kinds of islands—Provisions of Reg. XI of 1825 with respect thereto—'Fordable channel,' what—Origin of the doctrine of a fordable channel—Requisites of a strict definition of a fordable channel—Point of time to which the fordability or otherwise of the channel ought to refer—Examination of cases bearing upon this topic—*Wise* v. *Amirunnissa*—Act IV of 1868 (B. C.)—Provisions of the Alluvion Bills of 1879 and 1881 respectively with regard to a 'fordable channel'—Meaning of the expression 'shall be at the disposal of Government' in cl. 3, sec. 4 of Reg. XI of 1825—Ownership of accretions annexed to an island separated from the mainland by a fordable channel—Ownership of such accretions when they extend in front of the lands of several riparian proprietors—Ownership of sandbanks or churs thrown up in 'small and shallow' rivers—Ownership of the dried-up beds of such rivers—IV. Avulsion—Provisions of Reg. XI of 1825 in respect thereof.

I shall now proceed to deal with the law of India with regard to alluvion and diluvion.

Early Hindu law concerning alluvion.—Whatever the degree of historical interest which might attach to them, the provisions of the early Hindu law concerning this topic are evidently so meagre, vague and archaic that they do not deserve anything beyond a cursory notice.

A text of Vrihaspati alone, quoted in some of the commentaries[1] on Hindu law, though not to be found in the extant treatise with which his name is associated, is generally cited as embodying the whole law upon the subject. It runs thus:—

"If a large river or a king taking land from one village gives it to another, how is the adjudication to be made?

Land yielded by a river or given by the king is acquired by him on whom it is bestowed. If this be not admitted, then men cannot make any acquisition through royal favour or acts of God. Ruin, prosperity and even human life are dependent on acts of God and royal pleasure. Therefore, what is done by them shall not be disturbed.

Where a river forms the boundary between two villages, it gives or takes away land according to the good or bad luck of persons. When there is diluvion of the bank on one side of a river, and deposit of soil on the other, then his[2] possession of it[3] shall not be disturbed.[4]

If a field, with a growing crop on it, is overrun by a river, and dissevered (from the bank) by the force of its current, then the former owner shall have it."[5]

The above text is cited by the author of the Viramitradaya in the chapter on Boundary Disputes, as furnishing the rule of adjudication in the case 'where a river forming the boundary of several villages, &c., intersects one of them in such wise that land which was situated on its right side is thereby transposed to its left;' as also 'when the king assigns to one village land which had belonged to another.'

It is obvious from the text just quoted, viewed in the light afforded by the nature of the use which the author of the Viramitradaya makes of it, that what in the modern Anglo-Indian jurisprudence is treated

[1] Vivada Chintamani, (*tr.* by Prosunno Coomar Tagore ed. 1863) p. 123; Viramitrodaya, (*ed.* by Jibananda Bhattacharjea) pp. 461-462; Vyavahara Adhya, *title*: Boundary Disputes. The substance of the text is also to be found in Halhed's Gentoo Laws, 185. *Cf.* Colebrooke's Digest, v. ii. p. 284.

[2] *i. e.* 'The person who gains land by the action of the rivers'. Viramitrodaya.

[3] *i. e.* 'The land gained.' *Ibid.*

[4] *i. e.* 'Shall not be altered, *i. e.*, the former owner shall not wrest it from him.' *Ibid.* The author of the Viramitrodaya, after citing this passage, interposes the remark, that it relates to banks on which there is *no* growing crop, and that the next succeeding passage refers to banks on which there *is* a growing crop.

[5] *i. e.* 'The former owner shall have it till he reaps the crop grown thereon; but after the crops have been reaped, the case will be governed by the preceding rule.' Viramitrodaya.

as an exceptional rule, obtaining in particular localities only, was in ancient times the law almost universally prevalent in India. The deep channel of a river flowing between two villages, whatever changes took place in it, how much soever it might rob one village and enrich another, perpetually marked, under the ordinances of Vrihaspati, the indisputable, though fluctuating, boundary line between them. The extreme hardship which too strict an adherence to such a provision was likely to entail in some cases, was perceived even in those primitive ages, and it was therefore declared that, where land torn away from the bank had had a growing crop on it, the former owner was to remain in possession of it until he should have reaped the same.

Opinion submitted by the Hindu law officers to the Calcutta Sudder Dewanny Adawlut in 1814.—It was probably this text of Vrihaspati to which the Hindu law officers[1] referred (but which unfortunately they did not quote), in support of the opinion they submitted to the Court of Sudder Dewanny Adawlut at Calcutta in 1814, as to the provisions of the Hindu law upon the subject. But the actual opinion, which they stated, clearly went very much beyond its literal tenor. For they said, "the proprietary right in alluvial lands of the Ganges and such like rivers, the same being connected with one of the banks, vests in the proprietor of such bank. In alluvial lands unconnected with one of the banks, the right is that of those who are entitled to the julkur. In land left by the recession of the sea, the same being connected with the shore, the right vests in the owner of that shore. In land appearing above the sea not being connected with the shore, the right of the sovereign exists."[2]

Opinion of Mr. J. H. Harrington.—However that may be, it was stated by Mr. J. H. Harrington, (a judge of the Sudder Court, at whose instance this opinion was obtained), in a minute recorded by him in the year 1825, that the exposition of the law delivered by the Hindu law officers was substantially in accordance with his notions of the law and usage of the country upon the matter, subject, however, to one exception, namely, as to the rule of ownership of islands thrown up in large rivers with unfordable channels on all sides.[3]

In a note to his Analysis of the Regulations,[4] after citing a passage

[1] There is scarcely any provision in the Mahomedan law relating to alluvion. Markby, Lect. on Indian Law, 48.

[2] Markby, Lect. on Indian Law, 48-49. [3] *Ibid.* [4] Vol. ii. pp. 251-253.

from Vattel (Law of Nations, Bk. i. ch. 22) as containing the provisions of the Civil law upon the point, he more fully states the opinion which he had previously suggested in his minute. He says:—"This statement of the Civil law corresponds exactly with the established usage of Bengal. The most difficult question is, when churs, or islands, are thrown up in the middle of a river, or on the sea coast, to whom does the property of them appertain? In the latter case, indeed, when the chur is not immediately annexed to the contiguous estate, so as to come within the rule of gradual accession, there seems to be no doubt that the island belongs to the state. In the large rivers also, such as the Ganges, Megna and Burrumpooter, if a chur be thrown up in the middle of the river, or in any part where there is no fordable channel on either side, it is, I believe, according to established usage, considered to belong to Government. But if there be a ford on either side, it is deemed an accession to the estate connected with it by the ford. In smaller rivers, belonging to individuals, the right to a chur newly thrown up would of course vest in the proprietor of the bed of the river where the chur is formed."

Reported decisions prior to 1825.—The reports of the earlier decisions of the Calcutta Sudder Dewanny Adawlut prior to 1825 do not furnish us with more than half a dozen cases on the subject of alluvion. Almost all of them relate to claims by the owners of riparian estates to alluvial lands annexed thereto by gradual accession in consequence of the retrocession of the river and its encroachment upon estates on the opposite bank. Such claims were all decreed without exception.[1] In one of these cases, certain alluvial lands after having become annexed to a riparian estate by the gradual recession of the river, was afterwards severed from it by the river suddenly returning to its old course, whereby those lands became re-annexed to the estate on the opposite bank. It having been admitted on both sides that according to local usage the river always formed the mutual boundary between the two estates, the Court held that such alluvial lands became the property of the riparian owner to whose estate it became last united, and that the sudden character of the change in the channel did not affect the application of the rule.[2] There is one case in which an island thrown up in a *navigable* river was

[1] *Ishur Chunder Rai* v. *Ram Chand Mookerjee*, 1 Sel. R. 221; *Radha Mohun Rai* v. *Sooruj Narain Banerjee*, Ibid., 319; *Ziboonnissa* v. *Pursun Rai*, 3 Sel. R. 316; *Ram Kishen Rai* v. *Gopee Mohun Baboo*, Ibid., 340.

[2] *Raja Grees Chunder* v. *Raja Tejchunder*, 1 Sel. R. 274.

apportioned among the riparian proprietors opposite to whose estates it had appeared.[1]

Enumeration of topics.—Such was the state of the law until the year 1825, when the Indian legislature by Regulation XI[2] of that year declared and enacted the rules for the determination of claims to land gained by alluvion, or by dereliction of a river or the sea. It will be convenient to consider the law of alluvion and diluvion as it has been in force in India since this enactment, under the following (*a*) principal, and (*b*) subsidiary heads:—

(*a.*) *Principal.*

1. Alluvion. } in the sea, and in rivers navigable and
2. Dereliction. } non-navigable.
3. Islands. }
4. Avulsion.
5. Re-formation on original site.
6. Custom.

(*b.*) *Subsidiary.*

7. Assessment of revenue or rent on alluvial increments, including islands separated from the mainland by fordable channels.
8. Possession of accretions, islands or submergent lands, and the rules of limitation applicable to them.

1. **Alluvion**—Clause 1, section 4, of Regulation XI of 1825 enacts that "when land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landholder, or as a subordinate tenure, by any description of under-tenant whatever."

Incrementum latens.—This rule therefore clearly recognises the distinction between the mere physical adhesion of land which may be sudden and manifest, and the incrementum latens of the Civil law, which means an accretion formed by a process so slow and gradual as to be latent

[1] *Koowur Hari Nath Rai* v. *Musst. Joye Durga Burwain*, 2 Sel. R 269.

[2] This Regulation was extended to Panjab by Act IV of 1872; to the Central Provinces by Act XX of 1875; and to Oude, by Act XVIII of 1876. In Sindh, the law of alluvion is regulated by certain executive Rules, dated 22nd May, 1852. The Regulation does not apply to the Presidencies of Madras and Bombay.

and imperceptible in its progress;[1] and it lays down that it is only in the latter case that the accretion or increment belongs to the person to whose land it is so annexed. Lord Justice James in delivering the judgment of the Privy Council in *Lopez* v. *Muddun Mohun Thakoor*[2] observed that this clause embodies the principle recognised in the English law (derived from the Civil law), and which is this:—"that where, there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land."

Effect of omission of the expression 'imperceptible' from the Regulation.—The Regulation by using the expression 'gradual accession' only and omitting the qualification 'imperceptible,'[3] which a literal translation of the passage in Bracton, borrowed from Justinian, required in English law, has greatly obviated the doubt and difficulty which was raised and discussed in the case of *Rex* v. *Lord Yarborough*,[4] as to whether a subject is entitled to claim against the Crown any accretion by alluvion, unless the extent of the acquisition be so inconsiderable as to be almost imperceptible even after the lapse of many years. That case was decided by the Court of King's Bench in 1824, and it may not perhaps be quite unreasonable to suppose, that when this Regulation was passed in India in the following year, the qualification 'imperceptible' was advisedly omitted by the Legislature from the clause in question, to prevent the introduction into this country of a doctrine which had been so recently rejected in England. However plausible such a doctrine may have seemed at one time, (and whatever signs of its vitality may as yet be seen to linger in some of the text-books on the subject), in a country where the rivers are generally small, and their erosive powers insignificant, it is wholly unsuited to a region of tropical rain like India, where the huge torrents that descend from the Himalayas, expanding into mighty

[1] *Nogendra Chunder Ghose* v. *Mahomed Esoff*, 10 B. L. R. 406; 18 Suth. W. R. 113. Dist. *Secretary of State for India* v. *Kadiri Kutti*, I. L. R. 13 Mad. 369, (where the accretion was proved to have formed *suddenly*).

[2] 13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 W. R. (P. C.) 11.

[3] The German law, like the law of India, uses only the word 'gradual;' the French and Italian law speak of land gained 'gradually and imperceptibly.' Markby, Lect. on Indian Law, 62. The New York Draft Civil Code refers to land forming 'by imperceptible degrees.' *Supra*, 176.

[4] 3 B. & C. 91.

proportions as they roll over the soft clay of Bengal and the bright sands of the Panjab, possess such enormous powers of disintegration and deposition, that large tracts of land are seen to be washed away from one place and to be thrown up in another in the course of a single freshet. Indeed, so far as it is possible to judge from the reports of decided cases, there is not to be found a single instance in which Government in this country has resisted the claim of a private individual to an alluvial increment, on the ground that such increment was distinct, manifest and large, and not latent, imperceptible and small. Besides, accession of land by imperceptible degrees is so unusual in India that it led Sir Charles Turner, one of the members of the Indian Law Commission of 1879, to suggest that acquisition of land by alluvion should not be made to hinge upon the slow, gradual, and imperceptible character of its formation, but should be left to be dealt with by the Courts on a general principle sufficiently understood.

Rule of alluvion, in what cases applicable?—The rule which awards the alluvial accretion to the owner of the adjoining land, is the same whether the accretion takes place in the sea, a public navigable river, or in a private non-navigable stream.[1] I have already explained to you in a previous lecture[2] that the law of India makes no distinction between a tidal and a non-tidal river, for the purpose of defining the ownership of their respective beds. Under that law, a navigable river is contradistinguished from a non-navigable stream, the ownership of the bed of the one being regarded as vested primâ facie in the Government, as 'trustee for the public,' and the ownership of the bed of the other, as vested primâ facie in the riparian proprietors.[3] I have also shown that the banks of rivers, whether navigable or non-navigable, belong to the proprietors of adjacent lands.[4] If then the right to an alluvial accretion be a riparian right, which doubtless it is,[5]—dependent for its accrual on the ownership of the bank,—it follows necessarily that it must be the same whether such accretion takes place on the bank of a navigable or a non-navigable river. And indeed the Regulation itself, though it fully recognises and gives effect to the distinction between 'large and navigable rivers' and 'small and shallow rivers', when laying down the rule for the ownership of newly-formed islands, draws no such distinction

[1] *Dataram Nath* v. *Eshan Chunder Law*, 11 Suth. W. R. 116. But see *Moulvi Wahed Alee* v. *Syed Mozuffer Alee*, S. D. 1858, p. 1774, where the Court held that cl. 1, s. 4, Regulation XI of 1825 applies to navigable rivers only

[2] *Supra*, 110, *et seq.* [3] *Supra*, 110—113. [4] *Supra*, 115—116. [5] See Lect. X, *infra*.

when providing for the case of gradual accessions; because it says simply that, "when land may be gained by gradual accession, whether from the recess of a *river* or of the sea, it shall be considered an increment to the tenure of the person, &c."

Precise nature of the rule of alluvion—Qualification upon that rule.—But this rule, however manifest and universal at first sight it might seem to be, is indeed subject to one very important qualification, namely, that the site over which the accretion forms is not proved to belong to another private individual, for in that case the accession, though a lateral prolongation of the land of the riparian proprietor, is at the same time a vertical addition to the submerged site, and in determining the right of competing claimants to such accretions, the law prefers the owner of the submerged but identifiable site to the owner of the bank.[1] It might be urged that, if this qualification were pushed to its legitimate consequences, no riparian proprietor could claim a title by accretion to land gained from the bed of a navigable river, because the bed of such river belongs generally to Government, and in a very few instances only, to private individuals, the landward limits of such bed or the precincts of such submergent site being, as a matter of fact, always known and accurately defined in this country, by reason of the survey measurements which estates generally and riparian estates in particular have undergone. The possibility of such an objection as this being raised shows that the qualification is too broadly stated, and it enables us at the same time to arrive at a correct determination of the exact nature of the rule of alluvion, and the precise limits of the qualification. So long as the bed of a navigable river remains covered with water and is not vested in any private individual, it is regarded as 'public domain' or 'public territory,' and the law permits a riparian proprietor to gain lands from such 'public domain' or 'public territory' by means of alluvion. It is only where a portion of such 'public domain' adjoining the bank is vested in any private individual, that the title of the riparian proprietor by accretion yields to the title of the owner of the submerged site by what is called 'reformation.' It is obvious that no such objection can be taken to the qualification thus stated, when the accretion takes place on the bank of a non-navigable river; in such case, the ownership of the bank, and the ownership of the adjoining bed as far as the middle thread of the stream, being generally united in the same person, the title by accretion and the title by reformation mutually coincide, and it is perfectly immaterial whether

[1] *Infra*, 210—213.

the increment by alluvion be given to the riparian proprietor quà riparian proprietor or be given to him quà owner of the submergent site.

What evidence insufficient to prove 'gradual accession.'—It is difficult to define exactly the nature of the evidence which will suffice to show that a particular formation on the bank of a river is a 'gradual accession' within the meaning of the law. The two following cases show what evidence will be deemed insufficient to prove gradual accession.

In *Ranee Surnomoyee* v. *Jardine Skinner and Co.*,[1] an island thrown up in a large navigable river was resumed by Government and afterwards sold to a private individual. On the south of the island flowed an unfordable arm which gradually dried up in consequence of its having become closed at its east and west ends. The purchaser of the island claimed this dried-up bed as an accretion to the island by alluvion, relying merely on this peculiar mode of formation as conclusive evidence of gradual accession. The Privy Council held that such evidence taken alone was insufficient to show that the land had appeared as an accretion to the island by means of 'gradual accession.'

In *Pahalwan Singh* v. *Maharaja Mohessur Buksh Singh Bahadur*,[2] the Privy Council held that the mere fact that the surface of the land in question had all been changed, and the marks had all been obliterated, so that no houses, or trees, or mounds, or vestiges of boundary could be found, and that such surface was fresh land which had been brought down by the river, was not conclusive of the question of accretion, if the river had gone from one bed to another, and the water flowed over the intervening space and washed off the surface soil only.

The height which an alluvial formation must attain before it can form the subject of private right.—A point of great practical importance with regard to an alluvial formation, whether contiguous to the bank or insular, is, what is the height which it must attain before it can be said to cease to form a part of the public domain, so that private proprietary right might attach to it? In *Maharani Odhirani Narain Kumari* v. *Nawab Nazim of Bengal*,[3] the Court held that an alluvial formation in a public navigable river cannot be considered an accession to the adjoining estate, if it is regularly submerged in the wet season

[1] 20 Suth. W. R. 276; see also *Buddun Chunder Shaha* v. *Bipin Behary Roy*, 23 Suth. W. R. 110.

[2] 9 B. L. R. (150) 165; 16 Suth. W. R. (P. C.) 5.

[3] 4 Suth. W. R. (C. R.), 41.

and visible only in the dry; and that until the land rises beyond the ordinary high-water mark in such a way as to become fit for cultivation, it is part of the river-bed, and, as such, public property[1].

The judgment in this case is somewhat ambiguously expressed, inasmuch as the two propositions just stated are not necessarily co-extensive with one another. The latter proposition undoubtedly embodies what is perfectly sound law, as was subsequently judicially affirmed in *Nobin Krishna Rai* v. *Jogesh Pershad Gangopadhya*,[2] with regard to an insular formation in a tidal navigable river. So long as any alluvium, whether it is deposited contiguous to the bank or emerges from the bed as an island, is washed by the flow of the ordinary tides at a season when the river is not flooded, it can scarcely be used for cultivation or for any other useful purpose. But the former proposition, it is humbly conceived, is rather too broadly stated, because there are many alluvial formations which yield crops, and consequently are of value to the possessor, but which for years are visible during the dry season only.[3]

The key to the true criterion for determining the point at which an alluvial formation, either contiguous to the bank or insular, ceases to form a part of the 'public waste' or 'public domain,' and becomes susceptible of private proprietary right, may be obtained from the following observations of the Privy Council in *Lopez* v. *Muddun Mohan Thakoor*[4]:— "In truth when the words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the state, a public river belonging to the state; this was a gift to an individual whose estate lay upon the sea, a gift to him of that which by accretion became valuable and usable out of that which was in a state of nature neither valuable nor usable." Interpreting the Regulation by the light reflected upon it by this passage, the inference is clear, that the legislature intended to confer on the adja-

1 It is to be remarked that in that case the alluvion formed in the river Bhagirathi (a branch of the Ganges), at Moorshedabad, a place which is far above the reach of the tide.

2 6 B. L. R 343; 14 Suth. W. R. 352.

3 See speech of the Hon'ble Mr. W. Stokes on the Alluvion Bill, Gazette of India, Supplement, dated 12th Octr 1878. pp. 1591, 1592.

4 13 Moo. Ind. App 467; 5 B. L. R. 521; 14 Suth. W. R. (P. C.) 11.

cent riparian proprietor the alluvial formation as a gift only when it attained such height as to become, to use the language of the Privy Council, 'valuable and usable' to him. By parity of reasoning, the same intention may be attributed to the legislature when the alluvial formation appears as an island.

An alluvial formation may appear either in a tidal navigable river or in a non-tidal navigable river. If it appears in a tidal navigable river and rises so high as to be wholly free from submergence even during the annual floods, there can be but little doubt that it becomes in the generality of cases 'valuable and usable.' It might also be 'valuable and usable,' though perhaps not to the same extent, even if it were liable to submergence during the annual floods or only on the occasion of extraordinary spring tides in the dry season. But, if it happens to be washed by the flow of ordinary tides throughout the year, its fitness for cultivation or its capability of appropriation for any useful purpose is almost out of the question. It seems to me, that it would be more logical, although the result might practically be the same, to adopt the boundary line between the foreshore and the adjacent property—the boundary line between the public domain and private property—as the limit of the level which the alluvial formation must exceed before it could become the subject of private property; the foundation of the reasoning by which the limit is arrived at in either case being precisely the same, namely, that the soil of the bed of the sea or of a river continues to be part of the public domain so long as it is not capable of ordinary cultivation or occupation, or as Lord Hale expresses it, 'not dry or manoriable'. That boundary, as I have said in a previous lecture,[1] is the line corresponding to the average of the medium high tides between the springs and the neaps in each quarter of a lunar revolution throughout the year.

If, on the other hand, the alluvial formation appears in a non-tidal navigable river, although such formation may be liable to submergence during the annual floods, it may still be 'valuable and usable,' if it periodically appears above the surface of the water in the dry season only. These distinctions have been adopted in the following definition of an island contained in the Alluvion Bill of 1881 :—"In this Act 'island' means land surrounded by water and capable of being employed for cultivation, pasture or other useful purpose. It includes such land arising in a river

[1] *Supra*, 36.

or lake, submerged in the wet season and visible only in the dry season; but it excludes land arising in tidal rivers, tidal lakes or the sea, submerged by the flow of ordinary tides throughout the year."[1]

Alluvion resulting from artificial causes.—According to the English and the American law, a riparian proprietor, as I have already said,[2] is entitled to alluvion by gradual accretion, even though such alluvion is the result of artificial causes, provided, however, such artificial causes are the result of the lawful exercise of rights of property, and have not been put into operation with a view to the acquisition of such alluvion. And, in fact, this rule was also adopted by the Privy Council in an Indian case with regard to some lands on the bank of the river Hooghly.[3] Such cases as these are, however, extremely rare, and hence the Alluvion Bill of 1881 restricts the right of riparian proprietors to such alluvial lands as are the results of natural causes only, and recognises the right of Government in all other cases.[4]

Alluvion in beels or lakes.—As the first clause of s. 4 of Regulation XI of 1825 refers only to lands gained "from the recess of a river or of the sea," it has been held that the Regulation does not apply to accretions formed in a beel or lake.[5] But the new Alluvion Bill proposes to extend the law of accretion to lakes, except where the bed of such lake may be proved to belong to a private individual.

Apportionment of alluvions amongst competing frontagers.—Intricate questions relating to the apportionment of alluvial lands or abandoned river-beds amongst several competing frontagers have not as yet presented themselves for determination before Courts of Justice in this country. In the few instances in which the question has been raised, it has been simply for the partition of alluvial land between two riparian proprietors. In *Pahalwan Singh* v. *Maharaja Mohessur Buksh Singh Bahadur*,[6] the Privy Council divided certain alluvial accretions

1 The Indian Alluvion Bill of 1881, § 3; Gazette of India, March 19th, 1881, p. 689.

2 *Supra*, 133.

3 *Doe* d. *Seeb Kristo Banerjee* v. *The East India Co.*, 6 Moo. Ind. App., 269; 10 Moo. P. C. C. 140. Dist. *Secretary of State for India* v. *Kadiri Kutti*, I. L. R. 13 Mad. 369, (where an accretion in a tidal navigable river, being proved to have *suddenly* formed, in consequence of acts unlawfully done by the riparian owner, was held to belong to Government.)

4 The India Alluvion Bill of 1881. ss. 4, 5, 6 & 10. *Cf.* N. Y. Draft Civil Code, § 443, *supra*, 176 (note).

5 *Suroop Chunder Mozumdar* v. *Jardine Skinner & Co.*, Marsh. 334.

6 9 B. L. R. 150; 16 Suth. W. R. (P. C.) 5.

which had formed at the junction of two riparian estates, by a line drawn from the point of such junction perpendicular to the course of the river. This principle has been followed by the High Court in a number of cases, but the judgments in those cases have not been reported.

The Indian Alluvion Bill of 1879 provided that, where an alluvial land or an island separated from the mainland by a fordable channel, formed in the sea or a lake in front of the lands of several persons, its partition should be effected on the principle that, the owners of the shore were severally entitled to such land or island in proportion to the frontage which they respectively had on the sea or lake immediately before the formation; and left the modus operandi of such partition to an executive officer, who was to effect the same in accordance with such rules, consistent with this principle, as the local Government might from time to time prescribe.[1] I suppose one of the reasons which influenced the framers of this rule in leaving the method of working it out in practice in this indefinite form, was the impossibility of getting the middle thread with regard to the sea or a lake.

When alluvial land or an island is formed on the bank of or in a river in front of several frontagers, then, inasmuch as the river and consequently its middle thread may be, and generally is, a curve, the Bill provided that each owner having a frontage on the river is entitled to so much of the land or of the island as is included by his frontage, the thread of the stream during the dry season next after the formation, and lines drawn riverwards from the ends of such frontage to meet the thread of the stream in a direction normal to such thread; and it further provided that where more than one such normal could be drawn from one and the same end of any frontage and each of such normals was of different length, the shortest of such normals should be deemed to be the including line, and where more than one such normal could be so drawn and each of such normals was of the same length, the line bisecting[2] the angle between the two extreme positions of the shortest normal should be deemed to be the including line.[3]

A similar rule was provided by the Bill for the apportionment of abandoned river-beds.[4]

[1] Indian Alluvion Bill of 1879, ss. 4, 6.

[2] It is possible to conceive cases in which the bisectors might intersect one another before they reached the new frontage.

[3] Indian Alluvion Bill of 1879, s. 7.

[4] *Ibid.*, s. 9.

The rules thus framed did not, however, commend themselves as perfect or easily workable to the Select Committee which revised the Bill in 1881. Apart from the obvious objection to which they were open, namely, that they merely postponed the evil day by leaving important difficulties to be disposed of by rules to be made thereafter by the local Governments, the Select Committee thought that the rules as framed greatly complicated the question by making its solution depend on the 'thread of the stream,' a line or combination of lines which it would often be hard to determine, and which might, when determined, turn out to be of a very irregular shape. The necessity of drawing normals required by the rules provided by sections 7 and 9, was not always feasible, because it appeared to them that cases would sometimes present themselves in practice in which no such normals could be drawn.

They therefore rejected these rules in toto, and substituted for them an entirely new set of rules. Of these, the first is intended to apply to all cases in which new land is formed on a shore or bank of the sea, a river, or a lake by imperceptible accretion, and the second to all other formations to which riparian owners may have a right.

1. The first rule lays down that when the alluvial formation takes place either on the bank or shore of a river, the sea or a lake, and springs from a nucleus at the junction of two holdings, each owner shall be entitled to so much of the formation as lies on his side of a line drawn through the point of junction and bisecting the angle between the frontages at that point; and

2. The second rule provides that in the case of islands separated from the bank or banks by a fordable channel or channels, of land formed otherwise than by imperceptible degrees, and of abandoned river-beds, "each particle of the island or land so formed, or the river-bed so abandoned, shall belong to that one of the riparian owners who can show a point on the frontage of his holding nearest to such particle;" and it goes on to provide further that "when the line dividing the formation to which one owner is entitled under this section from the formation to which another owner is entitled under this section is an arc of a curve, the chord of such arc shall be substituted therefor."[1]

[1] With regard to the second rule, the Select Committee in their report said as follows:—

"The cases to be dealt with by the second rule, on the contrary, may present every variety of complication, but we think they may be provided for by a rule which is capable of being simply expressed, which would generally be easy to apply, and about the application of which

As the shore or bank may sometimes be a curve of a very irregular shape, the Bill by its second schedule provides elaborate rules for determining the frontage of a holding in order that the rules just stated may be easily applied.

The first rule is merely an application to a concrete instance of the principle laid down in the second, which, in fact, is its more generalized form and is based evidently upon the notion of proximity. Apart from the simplicity of the proposition which embodies this general rule, the chief merit of that rule consists in eliminating the middle thread and making the solution of every question relating to the apportionment of alluvial lands, whether formed in the sea, in a river or a lake, as well as of abandoned river-beds, depend solely upon the relative situations of the original riparian frontages. They possess the additional advantage of being workable in practice without the aid of accurate scientific instruments. But

there would never be any serious difficulty, and which, moreover, would make as fair a division of the new land as can be hoped for in a class of cases for which, in the absence of anything in the way of a definite principle to guide us, we must be content with a somewhat rough-and-ready rule.

The rule we propose (section 6) is, each particle of a new formation shall belong to that one of the riparian owners who can show a point in his frontage nearest to it; provided that, when the line dividing the portion of the land to which one owner is entitled from the portion to which another is entitled is an arc of a curve, the chord of such arc shall be substituted for the arc. The dividing line given by this rule will be different according to the relative positions of the two competing frontagers, but it will be one which it will be always easy to draw.

In ordinary case it will be the bisector of the angle between the frontages, or, in the case of holdings on opposite sides of a river with parallel frontages, a line parallel to the frontages and equidistant from both; in others it will be the perpendicular erected at the middle point of the line connecting the extremities of the frontages; and in others, again, it will be the chord of a parabola. As this last line might at first sight be supposed to present some difficulty, we think it well to explain that chord can be drawn without describing the parabola, and by a person altogether ignorant of the nature and properties of that curve. It is, in fact, simply, the right line connecting two points which could be fixed by any patwari or amin without the slightest difficulty. We may add as regards the substitution of the chord for the arc in this case, that it not only simplifies the problem, but also makes what we believe, would, by most persons, be considered a fairer division of the land."

N. B.—The only instance in which the dividing line will describe a parabola is, when one of the frontages is a straight line, corresponding to the directrix, and the other a point, corresponding to the focus. But it is difficult to imagine a case in which the frontage is merely a point. It is equally difficult to see how the chord of a parabola can be drawn without tracing the curve itself, and thereby determining the point on the new frontage to which the chord has to be drawn.

the theoretical excellence of this rule has been attained, it is conceived, at the sacrifice somewhat of those equitable considerations, which require not only that there should be a fair division of the new formation, but also that the division should be such, and so made, that each littoral or riparian owner may have a frontage on the new shore or river line. It appears to me that the latter condition, which is as much essential to a just partition as the former, has been overlooked. The effect of these rules is to make the apportionment wholly independent of the shape and configuration of the new formation. It is possible to conceive cases in which the conformation of the shore or bank, (as, for instance, in a cove), and the configuration of the alluvial formation may be such that, one or more of the littoral or riparian owners will be so completely hemmed in by the partition lines (drawn according to the above rules) intersecting one another, before they reach the new shore or river line, that they will thenceforward cease to be littoral or riparian frontagers; and be thereby deprived of the right to future alluvial formations and various other important riparian rights which the law annexes to such a situation, and upon which so much of the value of riparian properties in most countries depend.[1]

In view of these objections it seems to me that, it is almost impossible to frame any general rule such as will cover all possible cases, and that the set of rules adopted by the American lawyers[2] commend themselves to ordinary minds as being simple and most practicable, and at the same time fair and equitable.

Who are entitled to accretions by alluvion?—I have now to ascertain who are riparian owners, that is, to determine the classes of persons who are entitled to accretions by alluvion; and this, first of all, under clause 1, section 4, of Regulation XI of 1825. It is clear from the terms of that clause that every person from the zemindar or other superior holders, *i. e.*, independent talukdars or other actual proprietors of the soil, enumerated in and defined by Regulation VIII of 1793, down to every description of under-tenant, is entitled to increments by gradual accession. Government holding a resumed mehal on its rent-roll as its khas property, is in the same position as a private zemindar

[1] The method of apportionment adopted in the Alluvion Bill, 1881, is the same as that laid down by Bartholo in his treatise, 'De Fluminibus,' (ed. 1512), vol v. bk. 1. pp 630 *et seq.* but the latter has been criticized and rejected by Denisart for nearly the same reasons as those stated in the text. Collection de Decisions Nouvelles *tit.* Attérissement.

[2] *Supra*, 160—164.

and is entitled to the benefit of this clause, whether such resumed mehal be a riparian estate[1] or an island in a navigable river.[2] It has been held that a lakherajdar,[3] ex-mafidar,[4] mokurraridar,[5] a jotedar (maurusi-mokurrari,[6] or otherwise,[7]) and an occupancy-ryot[8] come within the denomination of 'under-tenants' used in that clause, and are therefore entitled to such increments. An ijaradar is also primâ facie entitled to future accretions, but he is certainly not entitled to accretions of an older date than that of his own lease.[9] There has been some conflict of opinion as to whether a tenant-at-will (a tenant from year to year would seem to be a better description of his status in this country) is entitled to accretions.[10] According to the latest view it appears that he is not.[11]

Under the Transfer of Property Act (IV of 1882)[12] a mortgagee, in the absence of a contract to the contrary, is entitled, for the purposes of the security, to all accretions by alluvion, annexed to the mortgaged property after the date of the mortgage. Under the same Act, a lessee[13], in the absence of a contract to the contrary, is entitled, so long as the lease subsists, to all such accretions, if added during the continuance of the lease.

Under the Bombay Revenue Code, section 104, clause 3, the owner of any holding granted by Government, the area of which has been fixed by any sanad or other document executed under the authority of Govern-

[1] *Collector of Pubna* v. *Ranee Surnomoyee*, 17 Suth. W. R, 163.

[2] *Kally Nath Roy Chowdhry* v. *J. Lawrie*, 3 Suth. W. R. (C. R.) 122.

[3] *Mussamat Rammonee Goopta* v. *Omesh Chandra Nag*, S. D. 1859, p. 1836; *Putheeram Chowdhry* v. *Kuthee Narain Chowdhry*, 1 Suth. W. R. (C. R.) 124.

[4] *Fazl-ud-din* v. *Mussamat Imtiyarunnissa*, 4. N. W. P. (C. Ap.) 152.

[5] *Chooramoni Dey* v. *Howrah Mills* Co. I. L. R. 11 Cal. 696.

[6] *Attimoollah* v. *Shaikh Saheboollah*, 15 Suth. W. R. 149 ; *Shorussoti Dasi* v. *Parbuti Dasi*, 6 Cal. L. R. 362.

[7] *Gobind Monee Debia* v. *Dina Bundhoo Shaha*, 15 Suth. W. R. 87 ; *Juggut Chandra Dutt* v. *Panioty*, 6 Suth. W. R. (Act X), 48.

[8] *Oodit Rai* v. *Ram Gobind Singh*, 3 N. W. P. (C. Ap.) 406.

[9] *Jaur Ali Chowdhry* v. *Pran Kristo Roy*, 4 Suth. W. R. (C. R.) 65 ; *Muthura Kanto Shaha Chowdhry* v. *Meajan Mandal*, 5 Cal. L. R. 192.

[10] The earlier rulings in favour of the right of a tenant-at-will to hold accretions, so long as he holds the parent holding, are :—*Narain Dass Bepary* v. *Soobul Bepary*, 1 Suth. W. R. (C. R.) 113; *Bhuggobut Pershad Singh* v. *Doorg Bijoy Sing*, 8 B. L. R. 73 ; 16 Suth. W. R. 95. Contra, *Zuheeroodeen Paikar* v. *J. D. Campbell*, 4 Suth. W. R. 57, (as to a tenant from year to year).

[11] *Finlay Muir & Co.* v. *Goopee Kristo Gossami*, 24 Suth. W. R. 404.

[12] S. 70, and *illust.* (a).

[13] S. 108, cl. (d).

ment, is not entitled to any increment added by alluvion. This rule is analogous to the provision of the Roman law, according to which the owner of an ager limitatus was not entitled to the ius alluvionis or right of alluvion.[1]

It is important to bear in mind, what no doubt is quite obvious that, the appellation 'riparian proprietor' does not belong to one whose estate is not in contact with the flow of water. Hence, if any one who is a riparian proprietor sells a strip of land stretching along the river frontage, he thereby ceases to be a riparian proprietor, and consequently the purchaser, and not he, is entitled to subsequent accretions.[2]

Nature of interest acquirable in accretions.—The last point which remains to be considered under the head of alluvion, is the nature of the interest which a littoral or riparian owner is entitled to have in the accretion. The right to the accretion is regarded in contemplation of law as a right of an accessorial character incident to the parent holding. Presumably, therefore, the right to the accretion, where such right exists, must be of the same nature as that which exists in the parent holding. "The land gained," observes Lord Chelmsford, in *Eckowrie Sing* v. *Heeraloll Seal*, "will then follow the title to that parcel to which it adheres."[3] The same clause of the first section of the Regulation, to which I have already referred, goes on to enact in the form of a proviso: "that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, &c." The cases to which reference has just been made, for the purpose of determining who are entitled to accretions, in fact also exemplify this principle.[4]

Consequently, if the owner of a permanently-settled estate accepts from Government temporary settlements in respect of accretions annexed to his estate by alluvion, such settlements do not curtail his permanent interest in the accretions, inasmuch as this is the only kind of settlement which Government does, in practice, grant in respect of alluvial

1 *Supra*, 121.

2 *Mussumat Idan* v. *Nund Kishore*, 25 Suth. W. R. 390.

3 12 Moo. Ind. App. 136; 2 B. L. R. (P. C.) 4; 11 Suth. W. R. (P. C.) 2. The passage occurs on page 140 *in fin.* of Moore.

4 See notes nos. 3—9 on p. 193, *supra*. See also *Mahomed Wasil* v. *Zulekha Khatoon*, 2 Hay, 515; *Ram Prasad Rai* v. *Radha Prasad Sing*. I. L. R. 7 All. 402 (where it was held that if the parent holding is "ancestral property" the increment will acquire the same character.)

formations during a considerable number of years, until the capabilities of the soil have been fairly ascertained.[1]

If a public road leads down to the bank of a river, and an alluvial accretion is afterwards formed on the bank, the public has the same right of access to the water across the new formation as they had before such alluvion formed.[2]

II. Dereliction.—Real nature of dereliction.—Dereliction may be either gradual or sudden. If it is gradual, the result, in the generality of cases, is the same as that which is produced by alluvion. The physical processes implied in them respectively, in fact correlate to one another. The deposit of soil on the bank, by the 'projection of extraneous matter' on it, cannot take place without a simultaneous withdrawal pro tanto of the water from the site which such 'projected' matter occupies. But if the dereliction is sudden, it is regarded as an altogether distinct mode of acquisition of property. Properly speaking, it is not a mode of acquisition of property at all; it merely denotes a particular mode of transition of land (in which there is already an existing right) from one state to another, from the state of being covered by water to the state of being dry land; and when there is this transition, the law uniformly declares that there shall be no change of ownership.

Ownership of the bed of the sea or of a river suddenly abandoned by it.—The Regulation provides no express rule with regard to the ownership of the bed of an arm of the sea, or of a river suddenly derelicted or abandoned by it; but by the fifth clause of its fourth section, it leaves the determination of such a question, in the absence of any established usage, to be made 'on general principles of equity and justice.'

Dereliction of the bed of an arm of the sea is an event of somewhat rare occurrence, and so is the total dereliction of the bed of a navigable river. Instances of partial dereliction, however, of the bed of a navigable river may be observed when sandbanks are thrown up or islands form in a navigable river, in such a way as to be separated at first from either mainland by fordable channels; one of which gradually closes up at one or both ends, and afterwards dries up suddenly. Whether the dereliction be partial or total, Government in this country being primâ

[1] *Raghoobar Dyal Sahoo* v. *Kishen Pertab Sahee*, L. R. 6 Ind. App. 211; 5 Cal. L. R. 418.

[2] *Maharanee Odhiranee Narain Koomari* v. *The Nawab Nazim of Bengal*, 4 Suth. W. R. (C. R.) 41.

facie the owner of the soil of the beds of all navigable rivers, its proprietary right therein continues even when the water retires from it.[1] If, however, a private individual has already acquired a right to the whole or any portion of the bed of any such river under an express or implied grant from Government, or if his proprietary right thereto has been recognised at the time of the Permanent Settlement of his estate (the survey maps of riparian estates being evidence of the boundaries of such estates as they existed at the time of the Permanent Settlement), the soil discovered by water remains in him as before.[2]

When the dereliction takes place in the channel of a non-navigable stream, the soil of the bed continues to be the exclusive property of one or other of the riparian proprietors, or even of a stranger, if he had an exclusive right to the soil when it was covered with water.[3] But, if there was no exclusive right to the soil in any one, then the presumption of law being, that it belonged to both the riparian proprietors in severalty, usque medium filum aquae, when it was covered with water, it would continue to be the property of each of them respectively to the same extent as before.[4]

Whether abandoned bed can form the subject of private ownership before it becomes 'usable.'—It is unnecessary to discuss again with regard to dereliction the question, which I have already considered with

[1] Cf. *Ranee Surnomoyee* v. *Jardine Skinner & Co.*, 20 Suth. W. R. 276; *Budun Chunder Shaha* v. *Bepin Behary Roy*, 23 Suth. W. R. 110; *Secretary of State for India* v. *Kadiri Kutti*, I. L. R., 13 Mad., 369.

[2] *Radha Proshad Singh* v. *Ram Coomar Singh*, I. L. R. 3. Cal. 796; 1 Cal. L. R. 259; *Grey* v. *Anund Mohun Moitra*, Suth. W. R. 1864 p. 108; *Isser Chunder Rai* v. *Ram Chunder Mookerjea*, 1 Sel. R. 221.

The Indian Alluvion Bill, 1881, by section 8, subsection (h) makes, as regards this point, the same provision as that which has been stated in the text It runs thus:—"Nothing herein contained shall affect the right of the Government or a private owner to the adjacent bed of a river, which is proved to belong to the Government or such owner immediately before its abandonment."

[3] *Grey* v. *Anund Mohun Moitro*, Suth. W. R. 1864. p. 108; *Isser Chunder Rai* v. *Ram Chunder Mookerjea*, 1 Sel. R. 221.

[4] Section 6 and section 8, subsection (h) of the Indian Alluvion Bill, 1881 taken together, lead substantially to the same result as that stated in the text, though in the Bill the rule has been laid down in a more comprehensive and generalized form. Section 6 (inter alia) provides:—"And where a river suddenly abandons its bed, each particle of the new bed so abandoned shall belong to that one of the riparian owners who can show a point on the frontage of his holding nearest to such particle."

"When the dividing line is an arc of a curve, its chord shall be substituted for it."

respect to alluvion, namely, whether land left by dereliction should be 'usable,'—should be fit for cultivation, pasture or for any other useful purpose, before private proprietary right might attach thereto; for, as I have already stated, there is no accrual of a new right in such a case, but merely the revival of a pre-existent right which had lain dormant for a while, and it is immaterial what the state of the land be (whether covered with water or dry), over which this right exists.

Apportionment of abandoned river-bed.—When the bed of a river is not the exclusive property of Government or of any private individual, the rules for the apportionment of such bed amongst the riparian proprietors, when it is derelicted or suddenly abandoned by the river, are the same as those for the apportionment of alluvial formations.

The Indian Alluvion Bill of 1879 provided the same rule for the apportionment of abandoned river-beds as it did for the apportionment of alluvial formations. The Alluvion Bill of 1881 proposed the following rule, namely, that the abandoned river-bed should be so divided that "each particle of it shall belong to that one of the riparian owners who can show a point in the frontage of his holding nearest to such particle." The same objections might be urged against the application of this rule to the apportionment of abandoned river-beds, as those which I have pointed out while I was discussing the matter in connection with the apportionment of alluvial formations.[1] If the provision of law be that the bed of a river, when it is not the exclusive property of Government or of a private owner, belongs to the riparian proprietors in severalty up to the middle thread, in proportion to the extent of their respective frontages, then it follows that the partition lines, however drawn, must not, in order that they may conform to this provision, intersect one another before they reach the middle thread; but, as I have said before, there may be cases in which the rule of apportionment proposed by the Indian Alluvion Bill of 1881 may lead to this consequence.

III. **Islands.—Ownership of islands formed by a river encircling a portion of the mainland.**—Like the other systems of law we have already discussed, this Regulation deals also with two kinds of islands, and enacts rules for determining their ownership in each case.

With regard to the first kind of island, the Regulation by the second clause of its fourth section thus provides:—

"The above rule shall not be considered applicable to cases in which a river by a sudden change of its course may break through and intersect

[1] *Supra*, 191—192.

an estate without any gradual encroachment, ... In such cases the land on being clearly recognised shall remain the property of its original owner."

It seems to me that this clause, though not very artistically framed, is intended to refer to the case where an island[1] is formed by a river encircling a portion of the land of a private owner. It lays down the same rule with regard to the ownership of such an island as that which is recognised in the other systems of law, namely, that the ownership of the soil remains unaffected by the change.

In *Thomas Kenney* v. *Beebee Sumeeroonissa*,[2] the Calcutta High Court in their judgment thus observed with regard to the meaning of this clause:—"A claim to hold the land under clause 2 can only be maintained by the old proprietors when the land used by man has not been diluviated, but is cut off by a change of the stream—fields, trees, houses, or other surface objects remaining as before."

But the observations of the Privy Council in *Pahalwan Sing* v. *Maharajah Mohessur Buksh Sing Bahadoor*[3], to which I have already referred[4], would seem to show that the continuance of the fields, trees, houses, or other surface objects in position is not essential to the operation of this clause.

This clause does not lay down any mode of acquisition of property. It is merely a qualification of the first clause, and declares that the latter shall not be applicable where there is a sudden change in the course of the river. If a person has acquired a right to property under the first clause by gradual accession, any subsequent change in the course of the river, such as is contemplated by the second clause, will not deprive him of his right.[5]

Ownership of islands formed in other modes.—With regard to the second kind of island, the Regulation enacts the following provisions:—

"*Third.* When a chur, or island, may be thrown up in a large and navigable river (the bed of which is not the property of an individual) or in the sea, and the channel of the river or sea between such island

[1] These small islands are known by the name of *chuckees* in Behar. Cf. *Pahalwan Sing* v. *Maharajah Mohessur Buksh Sing Bahadoor*, 9 B. L. R. 150; 16 Suth. W. R. (P. C.) 5.

[2] 3 Suth. W. R. (C. R.) 68.

[3] 9 B. L. R. 150; 16 Suth. W. R. (P. C.) 5.

[4] *Supra*, 185.

[5] *The Court of Wards* v. *Radha Pershad Sing*. 22 Suth. W. R. 238; affirmed by the Privy Council, on appeal, I. L. R. 3 Cal. 796; 1 Cal. L. R. 259.

and the shore may not be fordable, it shall according to established usage be at the disposal of Government. But if the channel between such island and the shore be fordable at any season of the year, it shall be considered an accession to the land, tenure or tenures of the person or persons whose estate or estates may be most contiguous to it, subject to the several provisions specified in the first clause of this section with respect to increment of land by gradual accession.

"*Fourth.* In small and shallow rivers, the bed of which with the julkur (or)[1] right of fishery may have been heretofore recognised as the property of individuals, any sand-bank or chur that may be thrown up shall, as hitherto, belong to the proprietor of the bed of the river, subject to the provisions stated in the first clause of the present section."

Enumeration of topics concerning islands.—As regards the third clause, the following matters require elucidation:—

(*a.*) The meaning of the expression 'fordable channel.'

(*b.*) The point of time at which the fordability or otherwise of the intervening channel should be ascertained for the purposes of this clause.

(*c.*) The meaning of the words, 'shall be at the disposal of Government.'

Probable origin of the doctrine of a fordable channel.—Now as regards (*a*), you will have observed that the doctrine of a fordable channel formed no part of the Roman law of alluvion. It could scarcely find a place in a system in which the theory with regard to the ownership of the bed of a river was that it was vested in the riparian proprietors; so that whether the island was separated from the banks by fordable or unfordable channels, in either case it was deemed to be the property of the riparian owners and not of the state. The necessity for the doctrine probably arose for the first time, when under the jurisprudence of the feudal system the theory regarding the ownership of the beds of rivers underwent a change, and the beds of all navigable rivers came to be regarded amongst the iura regalia of the Crown.

Fordable channel, what?—The Regulation itself contains no interpretation clause, nor does it anywhere define the meaning of the expression 'fordable channel.' But it has been held under that clause that, a channel which can be crossed only in a zigzag direction by taking

[1] The word 'or' does not occur in the Regulation, but it is evidently omitted by mistake. It is in Mr. Harrington's draft. Markby, Lect. on Indian Law, 53 (note).

advantage of the higher portions of the bed in the dry season, and that even only with the water breast-high cannot be said to be fordable.[1] It has been also held that a channel cannot be said to be fordable, if it can be crossed on foot at the extreme ebb of the tide only, and probably for some short time before and after; or, if under ordinary circumstances and at the most favourable season, it cannot be crossed at least for sixteen hours out of twenty-four.[2]

Requisites of a strict definition of a fordable channel.—The depth of a river in the dry season is not the same as it is in the wet, nor is it the same during all the months of the dry season. In fact, its depth varies from day to day, and in a tidal river, it varies almost every moment. For legal purposes, therefore, it is essential that there should be a precise definition of the word 'fordable', and such a definition requires that the following elements should be fixed, namely, (i) the exact depth of the water over the ford, (ii) the duration of time for which that depth must continue, and (iii) the point of time at which that depth is to be measured. The first two elements, regard being had to the nature of them, must necessarily be somewhat arbitrary, and can only be defined by the legislature. The third element is, perhaps, capable of being ascertained from the language of the clause itself, and this leads us to the consideration of point (*b*) mentioned before.

Point of time to which the fordability or otherwise of the channel ought to refer.—As regards (*b*), a reasonable construction of the context of the first part of the clause suggests the inference that, the period when the fordability or otherwise of the intervening channel is to be ascertained, is the time when the chur or island is thrown up; and therefore the meaning of this part of the clause is, that if the island is not fordable when it is thrown up, it is to be 'at the disposal of Government.'

But it frequently happens that at the commencement of the dry season, a very small portion of the chur or island emerges from the water, separated from either bank by unfordable channels, and as the water sinks down gradually, the visible surface of the island enlarges, and before the end of the same dry season it is found to be connected with one or other of the riparian estates by one or more fords, sometimes extending along the whole length of the frontage. It would indeed be extremely inequitable, nay almost illogical, to lay down that such chur or island should not belong to the riparian owner, but should be at the

[1] *Juggobundhoo Bose* v *Gyasoodeen*, 3 Suth. W. R. (C. R.) 94.

[2] *Nobin Kishore Roy* v. *Jogesh Pershad Gangooly*, 6 B. L. R. 343; 14 Suth. W. R 352.

disposal of Government, and at the same time to declare that he should be the owner of an alluvial increment which formed in contiguity with the bank, though it might have been wholly under water during a greater portion of the dry season, and only appeared above the surface just towards the latter end of that season; the only difference between the nature of the two formations being that, in the former case the soil between the chur or island and the adjacent land happens to be covered with a few inches of water, say, knee-deep or ankle-deep only; while in the latter, such soil is totally dry about the same period of time. It seems to me that it was to meet such a hardship as this, that the second part of the clause provided that, if the channel was fordable 'at any season of the year' it was to be considered as an accession to the land of the person whose estate might be most contiguous to it. The second part of the clause cuts down the apparent generality of the first, and the result, therefore, is that if the island is fordable 'at any season of the year,' that is to say, in any part of the dry season in which the formation appears above the surface of the water, and when the water has sunk to its lowest level, it should be considered to belong to the adjoining riparian proprietor; otherwise, it should be at the disposal of Government.

Examination of cases bearing upon the topic.—But then when one comes to examine the series of decisions that have been passed upon this clause, he finds not a little divergence and fluctuation of opinion with regard to the construction that ought to be put upon it. This is due in some measure to the ambiguity of the expression 'shall be at the disposal of Government,' and to the somewhat inartificial character of the provisions of Act IX of 1847, with which I shall have occasion to deal more fully hereafter.[1] That Act relates to the assessment of lands gained from the sea or from rivers by alluvion or dereliction; and by its third section provides for the making of a new survey of lands on the banks of rivers and on the shores of the sea, whenever ten years shall have elasped from the approval of any prior survey by the Government, and for the preparation of new maps according to such new survey. The seventh section enacts that whenever, on inspection of any such new map, it appears to the local revenue authorities that an island has been thrown up in a large and navigable river liable to be taken possession of by Government under clause 3, section 4, Regulation XI of 1825 of the Bengal Code, the said revenue authorities shall

[1] Lect. IX, *infra*.

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take immediate possession of the same for Government, and shall assess and settle the land, &c.

In *Wise* v. *Ameerunnissa Khatoon*,[1] and *Wise* v. *Moulvi Abdool Ali*,[2] decided within a few days of each other, the alluvial formation to which the plaintiffs Ameerunnissa Khatoon and Moulvi Abdool Ali laid claim under clause 1, section 4 of Regulation XI of 1825, appeared originally as an island with unfordable water on all sides, and subsequently became annexed to their respective estates before the time appointed for a re-survey under Act IX of 1847 arrived. Bayley and Campbell, J.J., held that Act IX of 1847 had the effect of modifying the provisions of the Regulation and of making the assertion of the rights of Government "to cease to be continuous but only at intervals of years;" and that it was clear from the language of the Act that the 'status' of the land at the time of the original formation thereof was not to be looked to, but that its 'status' at the time of re-survey alone was to be regarded. Being of that opinion, they decreed the land to the plaintiffs, although, as I have said, the island, when it was first thrown up, was surrounded with unfordable water on all sides. This was expressly dissented from by Norman, J., in *Kalee Pershad Moozoomdar* v. *The Collector of Mymensing and others*,[3] where he held that the true rule was that, the right to the possession of land either gained by gradual accession, or reformation, or thrown up in a river or the sea, must be determined by an enquiry into the condition of the land, when it was originally gained by alluvion or thrown up, and became the subject of property and capable of cultivation or occupation as such. In delivering judgment his Lordship said:—"It is difficult to see how a right which has once accrued can be divested by any change in the condition of land adjacent to that in which such right exists, and therefore one would think that if land comes into existence and becomes the subject of property as an island in a navigable river, the fact that the channel between it and the mainland dries up subsequently cannot destroy rights of property or possession, which any person may have acquired in it while it continued to be an island. As an island, it must be presumed to be at the disposal of Government. If it

1 2 Suth. W. R. 34; *Koer Poreshnarain Roy* v. *R. Watson & Co.*, 5 Suth. W. R. (C. R.) 283; 2 R. C. & Cr. (C. R.) 10; *Nogendra Chunder Ghose* v. *Mahomed Esoff*, 3 R. C. & Cr. (C. R.) 225. Cf. *Wise* v. *Ameerunnissa*, 3 Suth. W. R. (C. R.) 219.

2 2 Suth. W. R. (C. R.) 127.

3 13 Suth. W. R. 366.

is taken possession of and cultivated by any person, the Government may have rights against him. But his possession is good and constitutes a right as against all persons except the Government. The subsequent drying up of a channel between the island and the shore cannot affect his right to insist on his possession as a good title as against everybody except the Government, or one who can show a better title than himself. There is nothing in the 3rd clause of section 4, Regulation XI of 1825 which militates against this view. The clause in question does not, in fact, provide for the case of an island thrown up in a river, which at the time when it becomes capable of being occupied or cultivated, in other words, a subject of property, is separated from the lands most nearly adjacent to it by an unfordable channel, further than to declare that such island shall be at the disposal of Government. But if the Government does not think fit to lay claim to it, the case will fall within the 5th clause of section 4." His Lordship then read the clause in question, and continued—

"By Act IX of 1847, the right of the Government to come in and claim possession is postponed till the time of re-survey. But it is difficult to see how that Act can affect any question between the person in possession and any person other than the Government.

"I confess myself unable to assent to the rule supposed to be laid down in *Wise* v. *Ameerunnissa Khatoon*, 3 Weekly Reporter, 34, that the status of the land at the time of the re-survey is to be looked at in determining questions between rival claimants when the Government is not one of such claimants."

Next arose the case of *Mohini Mohun Doss* v. *Juggobundoo Bose*,[1] which came before Sir Barnes Peacock, C. J., and Jackson and Macpherson, J.J., upon a difference of opinion between Trevor and Glover, J.J., in which, strangely enough, the pendulum of opinion swung back to its former position. The Chief Justice, who delivered the judgment of the Court, observed as follows:—"If, when the island first formed, the river Bawor was not fordable from the plaintiff's estate which formed that part of the shore which was nearest to the island, the island might, according to clause 3, have been disposed of by the Government. If, before the Government disposed of it, the river between the plaintiff's estate Kootubpore and the island became fordable, then according to clause 5 it would belong to the plaintiff as the owner of Kootubpore."

This was followed by Phear and E. Jackson, J.J., in *Golamally Chowdhry* v. *Gopal Lall Tagore*.[2]

[1] 9 Suth. W. R. 312.

[2] 9 Suth. W. R. 401; 5 R. C. & Or. R. 26.

The question, however, ultimately came for decision before a Full Bench in the case of *Budroonissa Chowdhrain* v. *Prosunno Coomar Bose*,[1] where the learned Judges reviewed the previous authorities on the subject, and upon a consideration of the 3rd clause of section 4 of the Regulation as well as of Act IX of 1847 came to the conclusion that, the state of things existing at the time when the chur or island is thrown up or forms, is the criterion by which the right, either of the Government or of the owner of the contiguous land, is to be determined, and that the subsequent creation of a fordable channel between the island and the mainland does not affect the right acquired at the period of its first formation. With regard to Act IX of 1847, Couch, C. J,, after adverting to some of its provisions in his judgment, observed:—"What the Act seems to me to have intended to do was to prevent the great inconvenience which might arise from surveys being made at different times, probably of small portions of land, at a great expense, perhaps much greater, than the property would be worth, and adopt a system of having the surveys at stated periods, so that whatever rights might be found to have accrued to Government with regard to lands of this description, those rights might be enforced. It did not, I think, alter the period which had been fixed by Regulation XI of 1825 for determining whether the right existed or not, namely, the period of the formation of the chur or island, and lay down the time of survey or the preparation of the map as the period when those rights actually accrued."

This last view has been recognised and adopted by the Privy Council in *Wise* v. *Ameerunnisa Khatoon* and *Wise* v. *Collector of Backergunge*[2] where their Lordships say in their judgment that:—"Even if the Government was not entitled to assess the lands in consequence of Act IX of 1847,"—because a re-survey of the lands under that Act had not taken place—"they were entitled to take possession of them as lands which originally formed as an island, and were at their first formation surrounded by water which was not fordable, &c."

It is always a question of fact in each case as to what is that precise period of time when the chur or island may properly be said to have been thrown up or to have formed.[3]

[1] 14 Suth. W. R. (F. B.) 25.

[2] L. R. 7 Ind. App. 73; 6 Cal. L. R. 249; affirming on appeal, *Ameerunnissa Khatoon* v. *Wise*, 24 Suth. W. R. 435. See *Cannon* v. *Bissonath Adhicari*, 5 Cal. L. R. 154.

[3] *Budroonnissa Chowdhrain* v. *Prosunno Coomar Bose*, 14 Suth. W. R. (F. B.) 25, *per* Couch, C. J.

Provisions of Act IV of 1868 (B. C.)—The Full Bench case of *Budroonnissa Chowdhrain* v. *Prosunno Coomar Bose*,[1] was decided irrespective of the provisions of Act IV of 1868 (B. C.), although it had been passed two years before, because the suit in that case had been instituted before the passing of that Act. I shall therefore now proceed to call your attention to some of the provisions of that enactment. Section 1 repeals section 7 of Act IX of 1847.[2] Section 2 declares that when any island shall under the provisions of clause 3, section 4 of Regulation XI of 1825, be at the disposal of Government, all lands gained by gradual accession to such island, shall be considered an increment thereto and shall be equally at the disposal of Government.[3] Section 3 is substituted for section 7 of Act IX of 1847, and it provides that whenever it shall appear to the local revenue authorities that an island has been thrown up in a large and navigable river liable to be taken possession of by Government under clause 3, section 4 of Regulation XI of 1825 of the Bengal Code, the local revenue authorities shall take immediate possession of the same for Government, and shall settle and assess the land, &c. This section therefore makes the assumption of possession—or 'resumption,' as it is sometimes called,—of an island by the revenue authorities independent of the inspection, and consequently irrespective of the previous existence, of any revenue survey map made under section 3 of Act IX of 1847, such as was required by section 7 of Act IX of 1847. Section 4 enacts that any island of which possession may have been taken by the local revenue authorities on behalf of the Government under section 3 of this Act, shall not be deemed to have become an accession to the property of any person by reason of such channel becoming fordable after possession of such island shall have been so taken.

The Act does not expressly provide for the case where an island is thrown up, surrounded on all sides by unfordable water, which afterwards becomes fordable from the adjacent bank, but before such island has been taken possession of by Government. There can be no doubt, that it would still be governed by the Privy Council judgment to which I have just referred.

Fordable channel, what, according to the Alluvion Bills—The Alluvion Bill of 1879 as well as that of 1881, after defining, by an

[1] 14 Suth. W. R. (F. B.) 25. [2] *Supra*, 201.

[3] This was the law even before the passing of the Act. *Kally Nath Roy Chowdhry* v. *J. Lawrie*, 3 Suth. W. R. (C. R.) 122.

interpretation-clause, an 'island' as 'land surrounded by water and capable of being employed for cultivation, pasture or other useful purpose,' and pointing out, as I have already stated, what formations are included in such definition and what are not, goes on to lay down in the same clause that "a channel is said to be fordable when it does not exceed five feet in depth in the dry season next after the formation referred to and throughout the twenty-four hours."

The Bills then provide that when an island is formed in a river, the sea, or a lake and is separated from each bank or shore by a channel not fordable at any point, the Government is entitled to such island; but if it is separated from the bank or banks by a fordable channel or channels, the owner of such bank or banks is entitled to it. Now it may be observed that, although there are some islands which at their first formation are covered with fertilizing silts, which render the soil culturable by hand-sowing, yet in the large majority of cases, these islands at their first formation are mere tracts of sand (more or less extensive), scarcely fit for cultivation, pasture or other useful purpose, and it is not until after the lapse of a year or two that they grow fit for such purposes. The effect of the foregoing definition of an island, therefore, is that, the fordability or otherwise of the channel separating an island from the mainland is to be determined, and the competing claims of Government and of private individuals to the proprietorship of such island are to be adjudged, not by a reference to the state of things existing at the time when such island is first thrown up, but to those happening next after the period when the island becomes fit to be employed for cultivation, pasture or other useful purpose. Until an island becomes fit for any of these purposes, it continues by reason of this definition to be a part of the 'public domain,' incapable of being lawfully possessed by any private person, but liable, nevertheless, to be taken possession of meanwhile by Government, (for possession may be taken of it as soon as it is formed), as trustee for him who may thereafter acquire ownership in it, whether he be a private individual or the Government itself.

If Government lays claim to an island on the ground that it is fordable from a riparian estate belonging to itself, it is bound to show, like any other private individual,[1] that the intervening channel is fordable at any season of the year, and was fordable when the island was thrown up.

[1] *Mussamat Tahira* v. *The Government*, 6 Suth. W. R. (C. R.) 123; on review, 7 Suth. W. R. (C. R.) 513.

Meaning of the expression 'shall be at the disposal of Government' in cl. 3, s. 4, Reg. XI of 1825.—The words 'at the disposal of Government' used in clause 3 section 4, of Regulation XI of 1825, in section 7 of Act IX of 1847 and in section 2 of Act IV of 1868 (B. C.), mean that the property in, and the absolute right of disposal of, the island is vested in the Government, and not that the Government has merely a right to assess revenue on it.[1] That this is the true signification of these words is corroborated by the language of clause 12 section 5, of Regulation IX of 1825, where the same words occur, and where it is impossible to attribute any other sense to them.

Ownership of accretions annexed to islands separated from the mainland by fordable channels.—It follows as a corollary from clause 3, section 4 of the Regulation that, if an island or chur becomes the property of a riparian proprietor by reason of the fordability of the intervening channel, all further accretions to it, if gained by 'gradual accession,' also belong to him, even though the result in the aggregate may be a prolongation of the island in front of neighbouring riparian estates.[2] This is true only so long as the accretions to the island are added in such a way as to be unfordable from the estates of neighbouring riparian owners; and if the intervening channel silts up afterwards, that circumstance alone cannot deprive the owner of the island of the right which he has already acquired in such accretion. But it might be a question, whether if such accretions extended ex adverso of the frontage of his neighbour in such a way as to become fordable from his estate pari passu with the progress of the accretion, such increment to the island by accretion would still belong to him exclusively or would be divisible between him and his neighbour.

Ownership of accretions separated from the mainland by fords of unequal lengths.—Another question which might possibly arise is, if the accretion formed in front of two or more estates or holdings, situated either on the same bank or on opposite banks, in such manner as to be connected with each one of them respectively by fords of unequal lengths. Clause 3, section 4 of the Regulation provides generally that an accretion

[1] *Khellut Chunder Ghose* v. *The Collector of Bhagulpore*, Suth. W R. 1864. p. 73. Cf. *Wise* v. *Ameeroonissa Khatoon*, L. R. 7 Ind. App. 73 ; 6 Cal. L. R. 249 ; *Kalee Pershad Mozoomdar* v. *The Collector of Mymensing*, 13 Suth. W. R. 366 ; *Koer Poresh Narain Roy* v. *R. Watson, & Co.*, 5 Suth. W. R. (C. R.) 283 ; 2. R. C. & Cr. (C. R.) 10.

[2] *Golam Ali Chowdhri* v. *Gopal Lall Tagore*, 9 Suth. W R. 401. Cf. *Kally Nath Roy Chowdhri* v. *J. Lawrie*, 3 Suth. W. R. (C. R.) 122. This agrees with the Roman Law. *Supra*, 128.

separated by a fordable channel "shall be considered an accession to the land of the person or persons whose estate or estates may be most contiguous to it." There has been as yet no judicial interpretation of these words, but taking them in their plain ordinary sense, it is difficult to put upon them any other construction than that, in the case of an island fordable from two or more estates or holdings on the same bank or on opposite banks, the owner of the estate or holding with which it may happen to be connected by the shortest ford is to get it; but that if two or more estates or holdings happen to be connected with it by shortest fords of equal lengths, then it is to be apportioned among the owners of such estates or holdings respectively. It is easy to conceive instances in which such a rule as this is likely to result in grave hardship, by depriving riparian proprietors of their water frontage for ever, and hence the Alluvion Bills provide that in all such cases the island shall be divided among all those persons from whose estates or holdings it may be fordable, the lengths of the connecting fords being treated as wholly immaterial.

Under the head of alluvion, I have already discussed the rule for the apportionment, among several riparian owners, of islands separated from their respective estates by a fordable channel or fordable channels.[1]

In a suit to recover possession of an alluvial formation on the ground that it is an increment annexed by gradual accession, if the defence of the person, who is in possession thereof, either as lessee under, or as a purchaser from, Government, be that such formation originally arose as an island in a large navigable river surrounded on all sides by unfordable water, then Government must be made a party.[2]

Ownership of sandbanks or churs thrown up in 'small and shallow' rivers.—Sandbanks or churs thrown up in 'small and shallow' rivers, the beds whereof with the right of fishery belong to private individuals, are, by clause 4 of section 4 of the Regulation, which I have already read to you, declared to belong to the proprietors of such beds.

It has been held that accretions formed by alluvion in a 'small and shallow' river belong to the owner of its bed, even where the julkur, or the exclusive right of fishery, is in a third person.[3] The dried-up bed of the channel of such a river belongs to the owner of the estate in which

[1] *Supra*, 188—192.

[2] Act IX of 1847. s. 9.; *Cannon* v. *Bissonath Adhicari*, 5 Cal. L. R. 154.

[3] *Chunder Monee Chowdhrain* v. *Sreemuttee Chowdhrain*, 4 Suth. W. R. (C. R.) 54.

it is situated,[1] and the owner of the opposite bank cannot claim one-half of it on the ground that it was a flowing river before.[2]

Nadibharati lands, or lands discovered by the silting up of a small and shallow river, belong the owner of the site and not to the riparian proprietor to whose lands they happen to be an accretion.[3]

IV. Avulsion.—The rule as to avulsion is laid down by clause 2, section 4 of the Regulation in the following terms:—"The above rule"—*i. e.* the rule regarding land gained by gradual accession,—"shall not be considered applicable to cases in which a river . . . . . may by the violence of its stream separate a considerable piece of land from one estate and join it to another estate without destroying the identity and preventing the recognition of the land so removed. In such cases the land on being clearly recognised shall remain the property of its original owner."

A forcible and sudden disruption of land is so unusual a phenomenon even in such wild and erratic rivers as those in Bengal, that it is impossible to trace in the reports of cases any instance in which a claim upon that ground has ever been put forward. Should any claim be made to land on the ground that it was dissevered by avulsion, it seems, it would, in the absence of any special provision regarding the same in the Limitation Act, have to be made within the same period of limitation as that which is prescribed for ordinary suits for recovery of possession of land.

[1] *Mirza Syfoollah* v. *Bhuttun*, 10 Suth. W. R. 68.

[2] *Prosunno Kumar Thakoor* v. *Kristno Choitonno Rai*, 2 R. C. & Cr. (C. R.) 14.

[3] *Hari Kishore Dutt* v. *The Collector of Dacca*, 3 B. L. R. (App.) 116.

LECTURE VIII.

ALLUVION AND DILUVION.—(*Continued*).

(*Anglo-Indian Law*).

V. Reformation on original site—Passages from judgment in *Lopez's case*—Principles enunciated therein—Does the doctrine of reformation apply where the antecedent diluviation of site had taken place by slow, gradual and imperceptible degrees ?—Reasons for a negative conclusion—Historical review of the cases relating to the doctrine anterior to *Lopez's case*—*Lopez* v. *Muddun Mohan Thakoor*—*Nogendra Chandra Ghose* v. *Mahomed Esoff*—Nature of cases to which the doctrine applies—Discussion of the modes in which a subsisting right to the site is generally evidenced—Doubtful case of reformation on old site—Nature of proof of title to the site required—Right of a purchaser of an estate from Government to lands reformed on original sites under peculiar circumstances—Illustration of such a case—VI. Custom—Reg. XI of 1825, s. 2.—Hardship of the custom—Different kinds of usages in the Punjab—Discussion of their respective merits—Usage must be clear and definite—Usage merely local—*Baboo Bissessur Nath* v. *Maharajah Mohessur Buksh Sing Bahadur*.

V. Reformation on original site.—The rules relating to the acquisition of ownership in alluvial formations, derelict or abandoned river-beds, and islands, discussed in the preceding lecture, are subject to an all-important and overriding proviso, introduced by Courts of Justice under the guidance of 'the general principles of equity and justice', prescribed for them by the legislature, by the residuary clause of the fourth section of the Regulation. That proviso may be shortly stated thus: Where land is formed on a diluviated but ascertainable site, or where an ascertainable site is discovered by the recession or subsidence of waters, such land or discovered site belongs to him who has a subsisting title thereto. This is called the doctrine of 'reformation on original site,' and it rests upon the principle that in contemplation of law, land covered by water is the same as land covered by crops. Law knows no difference between land covered by water and land covered by crops, provided the ownership of the land can be ascertained.

Passages from judgment in Lopez's case.—In order that you may thoroughly appreciate the real foundation and the nature of this doctrine, I propose to read to you a few passages from the judgment of the Privy Council in *Lopez* v. *Muddun Mohan Thakoor*[1] which is the leading case upon

[1] 13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 Suth. W. R. (P. C.) 11.

the subject. They contain at once a complete exposition and a precise definition of the principles upon which the law of accretion, as well as the doctrine of reformation on original site, is based. Their Lordships said:—"The rule of the English law applicable to this case, is thus expressed in a work of great authority, Hale de Iure Maris, p. 15:—'If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced, yet if by situation and extent of quantity and bounding upon the firm land, the same can be known, or it be by art or industry regained, the subject doth not lose his property.' 'If the mark remain or continue, or the extent can reasonably be certain, the case is clear.' And in another place, p. 17, he says: 'But if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make out where and what it was; for he cannot lose his propriety of the soil, although it for a time becomes part of the sea, and within the Admiral's jurisdiction while it so continues.'

"This principle is one not merely of English law, not a principle peculiar to any system of municipal law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner.

"There is, however, another principle recognised in the English law, derived from the Civil law, which is this,—that where there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land, *Rex.* v. *Lord Yarborough* (2 Bligh, N. R., 147). And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea (*In re The Hull & Selby Railway*, 5 Mee. & Wel. 327). To what extent that rule would be carried in this country, if there

were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined.

"This principle of law, so far as relates to accretion, has, to some extent, been made part of the positive written law of India, and it is on the operation of such positive written law that the defendants' case is based. This law is to be found in the Regulation XI of 1825, a Regulation for declaring the rules to be observed on the determining of claims to lands gained by alluvion, or by the dereliction of a river, or the sea. There is a recital in that Regulation, as to disputes which had arisen with regard to such claims, and the necessity of having some definite rule laid down with regard to several matters, only one of which is material or relevant to the present case; and that is the case provided for by the 4th section of the Regulation. By clause 1 of that section it is provided that, 'when land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from the Government,' or from any intermediate landowner. And the defendants' contention is, that the plaintiff's land having been wholly submerged, so as to make their (the defendants') land the river boundary, the subsequent recession of the river has caused a gradual accession to their land, and an increment by annexation to their estate, notwithstanding that the land has been reformed on the ascertainable and ascertained site of the plaintiff's mouzah.

"It is to be observed, however, that that clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication. The plaintiff here says,—'I had the property. It was my property before it was covered by the Ganges. It remained my property after it was submerged by the Ganges. There was nothing in that state of things that took it from me and gave it to any other person.' And in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order

to enable the owner of one property to take property which had been legally vested in another.

"In truth, when the whole words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with, was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the state, a public river belonging to the state; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable out of that which was in a state of nature neither valuable nor usable.

"And on the very words of the section itself, if the ownership of the submerged site remained as it was (and there seems nothing to take it away), it is difficult to see why a deposit of alluvion directly upon it is not at least as much an accretion and annexation vertically to the site as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property."

Principles enunciated therein.—The principles enunciated in the passages I have just read may shortly be formulated thus:—

1. An acquisition of land from the sea or a river must satisfy two conditions, before it can be claimed by an adjoining proprietor under the law of accession:—

(*a.*) The acquisition must be by gradual, slow, and imperceptible means.

(*b.*) The acquisition must be made from that which is part of the 'public territory', the 'public domain' or the 'public waste', as it is sometimes called, and not out that which is the property of a private individual.

2. A claim founded on the doctrine of 'reformation on original site' must also satisfy two conditions:—

(*a.*) The site over which the land reforms must be clearly ascertained to be the property of a private owner, (Government in its capacity of a zamindar being included in that category).

(*b.*) It must be shown that such owner has a subsisting title to the site at the time when he makes the claim.

Lord Justice James, who delivered the judgment of the Judicial Committee, assimilates the doctrine of reformation on original site to the law

of accretion by alluvion, and describes the latter as 'an accretion and annexation longitudinally' to the riparian frontage, and the former as 'an accretion and annexation vertically' to the site.

Does the doctrine of reformation apply where the antecedent diluviation of site had taken place by imperceptible degrees?—Reasons for a negative conclusion.—It seems questionable whether the doctrine of reformation on original site may properly be extended to the case, where the site upon which land is reformed by deposit of alluvion had previously been submerged under water by the slow, gradual and imperceptible encroachment of the river, although the site may be as clearly identifiable, as it is where land becomes submerged in consequence of a sudden inundation. The distinction between the two modes of submergence has, as I have pointed out already[1], been clearly recognised in a recent English case,[2] which lays down that gradual and imperceptible encroachment by a river, even when the extent of such encroachment, or, in other words, of the submerged site, is capable of being clearly ascertained, creates a right in favour of the owner of the bed, and consequently extinguishes the right of the owner of the site.

This distinction is also traceable in the judgment of the Privy Council, I read to you just now. The passages cited by Lord Justice James from Hale de Iure Maris occur in that treatise under the heading 'The increase per relictionem, or recess of the sea,' which, as is stated in a subsequent chapter, refers to 'a sudden retreat of the sea;' and Lord Hale adds in that chapter that, "this accession of land, in this eminent and sudden manner by the recess of the sea, doth not come under the former title of alluvio, or increase per projectionem." And even in the passage cited by Lord Justice James, Lord Hale says:—"If a subject hath land adjoining the sea, and the *violence* of the sea swallow it up, &c." The Privy Council in their judgment go on to say:—"Whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner." It is clear from this passage, read by the light of the passages cited from the De Iure Maris, that the Privy Council was thinking of the absorption of a field by a cataclysm of as sudden and violent a character, resulting, for instance, from an earthquake or a cyclone, as is the devastation of a

[1] *Supra*, 154—158.

[2] *Foster* v. *Wright*, 4 C. P. D. 438.

vineyard by lava or ashes from a volcano. This position also derives additional, if not much, support from the fact that their Lordships stated further that in their opinion the question raised in the case then before them was similar to that which had arisen in a previous case decided by them, namely, that of *Mussumat Imam Bandi* v. *Hurgobind Ghose*[1], where, in describing the nature of the submergence of the land before its re-appearance, their Lordships said that the land then in dispute had previously been 'inundated.' An inundation, though it may not always be a sudden event, certainly cannot be described as a change which is slow, gradual and imperceptible in its progress.

Review of authorities anterior to Lopez's case.—Having thus ascertained the true basis of the doctrine of reformation on original site, I think we are now in a position to review its previous history. The first case in order of time is *Mussumat Imam Bandi* v. *Hurgobind Ghose*[2] (1848) decided by the Privy Council. There the question was whether a certain quantity of alluvial land formed part of the appellants' or of the respondents' estate. Their Lordships said: "The whole of the district adjoining the land in dispute, as well as that land itself, is flat, and very liable to be covered or washed away by the waters of the Ganges, which river frequently changes its channel. That land in dispute was inundated about the year 1787; it remained covered with water till about 1801, and then became partly dry, until, in the year 1814 it was again inundated. After this period it once again re-appeared above the surface of the water, and by the year 1820, it became valuable land.

"The question then is, to whom did this land belong before the inundation? Whoever was the owner then, remained the owner while it was covered with water, and after it became dry."

The next case is *Mussumat Sunduloonissa Beebee* v. *Gooroopersad Rai*,[3] (1859) where the Calcutta Sudder Dewany Adawlut acted upon the same principle as that laid down in the judgment of the Privy Council I have just noticed. Then followed the case of *Romanath Tagore* v. *Chunder Narain Chowdhry*[4] (1862) where Peacock, C. J., and Bayley and Kemp. J.J.,

[1] 4 Moo. Ind. App. 403; 7 Suth. W. R. (P. C.) 67; 2 B. L. R. (P. C.) 4.

[2] *Ibid.*

[3] S. D. 1859, p. 470.

[4] Marsh. 136; Suth. W. R. Sp. No. 45. It may be remarked that in this case the riparian owner received from Government an abatement of revenue in proportion to the land lost by diluvion, and yet he was held entitled to the land which had reformed on the submerged site.

decided that lands washed away and afterwards reformed on an old site, which can be clearly recognised, are not lands 'gained' within the meaning of clause 1, section 4, Regulation XI of 1825, that is to say, they do not become the property of the adjoining owner but remain the property of the original owner. Their Lordships said:—"It never could have been intended that where the surface of an estate is washed away, and the lower portion of it is covered with water and formed into a portion of the bed of a river, the ownership of that portion of the estate which has become inaccessible in consequence of its being covered with water should be lost"; and "that, when the surface is reformed it should become the property of an entirely different owner, because he may happen to be the owner of the estate adjoining. If such were the case, if A had an estate between a river and the estate of B, and A's estate were washed away, leaving B's estate adjoining the river, B would become the owner of A's estate if it should be gradually reformed on the old site." They go on:—"The principle is that, where the accretion *can be clearly recognised* as having been reformed on that which formerly belonged to a known proprietor, it shall remain the property of the original owner. This is founded on general principles of equity and justice, which are the principles recognised by the 5th clause. We think clause 1, section 4, applies only to cases of land gained, that is to say, formed upon a site which *cannot* be recognised as that of any former proprietor."

In *Kirtee Narain Chowdhry* v. *Protab Chunder Burooah*,[1] (1863) there was a difference of opinion between Campbell and Bayley, JJ., as to whether the case which was before them came within the purview of *Romanath Tagore* v. *Chunder Narain Chowdhry*[2], the latter holding that it did, and the former, that it did not. Campbell, J. referred to the Civil law and cited Code Napoleon in support of his position that the mere fact that the original site can be geographically ascertained does not preclude the riparian owner from claiming the reformation on that site as an accession to his estate by alluvion. He said: "when the whole of the useful upper soil is gone, the mere fact that the site is geographically the same, and that the subsoil in the bowels of the earth may still be the same, will not enable him to follow and reclaim the new land." When the case came before a Full Bench, the learned judges declined to return any answer

[1] Suth. W. R. (Sp. No.) 129; 2 Sevestre 88*a*.

[2] Marsh., 136; Suth. W. R. (Sp. No.) 45.

on the point, being of opinion that the case resolved itself into a mere question of boundary.

In *Maseyk* v. *Hedger*,[1] (1864) the Court drew a distinction between the case where land is gained by the gradual recession of a river and is added to a riparian estate by the operation of nature, although such land may at the same time have reformed on a site which was formerly part of the property of another person; and the case where the river encroaches upon and diluviates a riparian estate and then goes back leaving a new formation on the original site. In the former case, it held that the land reformed would belong to the riparian owner; in the latter, to the owner of the old site. It is difficult to see upon what principle this difference between the resultant rights in the two cases can be based, if it is once assumed that in either case the formation is upon an identifiable site belonging to some known individual. Besides, there does not appear to be any foundation in fact for the physical distinction which is supposed to exist between the two cases, because reformation on an old site always implies diluviation of that site at some anterior period. It would be a manifest contradiction of ideas to speak of land 'gained' for the first time from the bed of a navigable river (the doctrine of reformation being clearly inapplicable to a private stream), as being at the same time a reformation on a 'site,' which, according to its received signification connotes antecedent proprietary right in some private individual.

To proceed: The point then arose for consideration before a Full Bench in *Katteemonee Dasi* v. *Ranee Monmohinee*,[2] (1865) where the facts were shortly these:—The plaintiff's estate was situated between the river on one side and the defendant's estate on the other. The river diluviated the whole of the plaintiff's, and a portion of the defendant's estate; after more than a quarter of a century the river receded, and the result was that lands reformed on the original sites of both the estates.

Their Lordships reviewed the case of *Romanath Tagore* v. *Chunder Narain Chowdhry*[3], and that of *Mussumat Imam Bandi* v. *Hurgobind Ghose*[4], and held that the principle laid down in them could be applied only where the surface stratum was swept away and lost, without disturbing the

[1] Suth. W. R. 1864, p. 306.

[2] B. L. R. Supp. Vol. 353; 3 Suth W. R. (C. R.) 51; 2 Sevestre, 88g.

[3] Marsh., 136; Suth. W R. Sp. No. 45.

[4] 4 Moo. Ind. App. 403; 7 Suth. W. R. (P. C.) 67; 2 B. L. R. (P. C.) 4.

old ownership in the land or mines beneath; but that such ownership could not continue after the lapse, as in that case, of such a long period, as a quarter of a century, unless something beyond mere identity of site was adduced in proof of it. The Privy Council in noticing this case in their judgment in *Lopez* v. *Muddun Mohan Thakoor*[1], observed: —"And it seems to have been considered that the former case" —that is, *Romanath Tagore* v. *Chunder Narain Chowdhry*[2]—"did not apply to any case where the property was to be considered as wholly lost and absorbed, and no part of the surface remained capable of identification; where there was a complete diluviation of the usable land, and nothing but a useless site left at the bottom of the river. Their Lordships, however, are unable to assent to any such distinction between surface and site. The site is the property and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained."

The judgment of the Full Bench was followed in *Kenney* v. *Beebee Sumeeroonissa*,[3] (1865), *Kaleemonee Debia* v. *The Collector of Mymensingh*,[4] (1866), *Narainee Burmonee* v. *Tarinee Churn Singh*[5] (1866), *Kazi Torabooddeen* v. *Sham Kanth Banerjee*[6] (1866), and *Muthoora Nath Muzoomdar* v. *Tarinee Churn Singh*[7] (1867). In the last case the learned judges felt constrained to follow the Full Bench decision in *Katteemonee Dasi* v. *Monmohinee Debee*[8], although the lands in dispute had reformed only five years after diluviation. Peacock, C. J., who delivered the judgment of the Court, thus remarked with regard to that case:—"I do not thoroughly understand all that is said in the Full Bench case reported in the 3rd Weekly Reporter, p. 51, with regard to time and means of identity." The Full Bench case was also followed in *Gobind Nath Sandyal* v. *Nobo Coomar Banerjee*[9] (1867), and noticed in *Mohinee Mohan Das* v. *Jugobundhu Bose*,[10] (1868), where Peacock, C. J., said that, besides the two modes of acquisition expressly provided for by the Regulation, namely, where land is gained by gradual accession, and where a chur or island is thrown up in a large navigable river and the channel between such island

[1] 13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 Suth. W. R. (P. C.) 11.
[2] 2 Marsh., 136; Suth. W. R. Sp. No. 45.
[3] 3 Suth W. R. (C. R.) 68.
[4] 5 Suth. W. R. (C. R.) 55.
[5] 6 Suth. W. R. (C. R.) 40.
[6] 6 Suth. W. R. (C. R.) 249.
[7] 8 Suth. W. R. (C. R.) 164.
[8] B. L. R. Supp. Vol. 353; 3 Suth. W. R. (C. R.) 51; 2 Sevestre, 88g.
[9] 8 Suth. W. R. 206.
[10] 9 Suth. W. R 312.

and the shore is fordable at any season of the year, it was once thought that there was a third mode in which land might be acquired, namely, by reformation on an old site, but that the Full Bench had decided that the ownership of the site did not give a title to the reformation. The last case which closed the series was *Rashmonee Dasi* v. *Bhobonath Bhuttacharjee*[1] (1869). It only remains now for me to notice *Maharanee Indurjeet Koer* v. *Mohunt Jumna Das*[2] (1870) which was decided apparently before the judgment of the Privy Council in *Lopez* v. *Muddun Mohan Thakoor*,[3] arrived in this country. There the foundation of a house and of a well was discovered beneath the surface of the land which had reformed, and was identified as having been the property of the plaintiff before submersion. From this the High Court inferred that the Court below had in effect found that the substratum of the land had never been diluviated and was still recognisable, subject only to a certain surface of sand which had been deposited upon it, and it therefore held that that finding brought the case within the exceptional instance of the discovery of a mine in the site referred to in the decision of the Full Bench.

Lopez v. Muddan Mohan Thakoor.—This somewhat long chain of decisions, extending over a period of nearly eight years, was at last overruled by the judgment of the Privy Council in *Lopez* v. *Muddan Mohan Thakoor*,[3] in which the facts were closely similar to those in the Full Bench case of *Katteemonee Dasi* v. *Monmohinee Debi*.[4] The appellant's estate was situated between the river on one side and the respondents' estate on the other. In 1840, a portion of the appellant's land having been washed away, and fears being entertained as to a confusion of boundaries, a plan was, by consent of the appellant and the respondents, drawn up, showing the boundaries as they existed of old. Subsequently, the estate of the appellant was completely submerged, but he nevertheless continued to pay Government revenue for it. In 1848 the river began to recede and alluvial accretions began to form on the old site of the appellant's estate, but in contiguity with the unsubmerged land of the respondents. In that year a survey map was made in which the boundaries of the appellant's estate, including the submerged portion, were retained with the aid of the map that had been prepared by the

[1] 12 Suth. W. R. 252. [2] 14 Suth. W. R. 104.
[3] 13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 Suth. W. R. (P. C.) 11.
[4] B. L. R. Supp. Vol. 353; 3 Suth. W. R. (C. R.) 51; 2 Sevestre, 88g.

parties themselves in 1840. In 1861 the alluvial deposit increased so as to make it fit for cultivation. The land in dispute in this case was thus covered by water for a period of only eight or nine years. Upon these facts the Privy Council pronounced the judgment, the material portions of which I have already read to you.

The principle laid down in that case has been subsequently re-affirmed by the Privy Council in several other cases,[1] and may now be taken as settled law.

Nagendra Chandra Ghose v. Mahomed Esoff.—Out of those I shall at this stage only refer to the case of *Nogendra Chandra Ghose* v. *Mahomed Esoff*.[2] It is not necessary to read to you in extenso the whole of that judgment. After having shortly stated the principal provisions of the Regulation, their Lordships continued:—"Two observations arise on the statute.

"1*st*.—There is nothing to show that the first rule contemplates other than that which commonly falls within the definition of 'alluvion,' *viz*., land gained by gradual and imperceptible accretion, the *incrementum latens* of the Civil Law.

"2*nd*.—No express provision is made for the case of land which has been lost to the original proprietor by the encroachment of the sea, or a river. But, on the other hand, there is nothing to take away or destroy the right of the original proprietor in such a case, which must, therefore, be determined by 'the general principles of equity or justice' under the fifth rule."

I shall also read that portion of the judgment in which their Lordships reconcile the apparent inconsistency between their judgments in *Eckowri Singh* v. *Hiralal Seal*[3] and *Lopez* v. *Muddan Mohan Thakoor*[4] respectively, and dispose of an argument, founded upon an American work, against the right of riparian proprietors to increments annexed to estates, having a fixed area, and bounded by mathematical lines. They say:—"It was moreover contended that some at least of the principles

[1] *Nogendra Chunder Ghose* v. *Mahomed Esoff*, 10 B. L. R. 406; 18 Suth. W. R. 113; *Pahalwan Sing* v. *Mohessur Buksh Sing*, 9 B. L. R. 150; 16 Suth. W. R. (P. C.) 5; *Hursahai Sing* v. *Syud Lootf Ali*, L. R. 2 Ind. App. 28; 23 Suth. W. R. 8; 14 B. L. R, 268; *Rani Sarat Sundari Debya* v. *Soorjya Kanth Acharjya*, 25 Suth. W. R. 242; *Radha Proshad Singh* v. *Ram Coomar Singh*, I L. R. 3 Cal. 796; 1 Cal. L. R. 259.

[2] 10 B. L. R 406; 18 Suth. W. R. 113.

[3] 12 Moo. Ind. App. 136; 2 B. L. R. (P. C.) 4; 11 Suth. W. R. (P. C.) 2.

[4] 13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 Suth. W. R. (P. C.) 11.

laid down in the case of *Lopez* v. *Muddan Mohan Thakoor*[1], are in conflict with the previous decision of this Board in the case of *Eckowri Singh* v. *Hiralal Seal*[2]. That case had not been reported when that of *Lopez* v. *Muddan Mohan Thakoor*[1] was decided, and does not appear to have been cited in the argument. Their Lordships cannot, however, perceive any inconsistency between the two judgments. The decision in the case of *Eckowri Singh* v. *Hiralal Seal*[2] seems to have proceeded on two grounds, namely, 1st, that it was not competent to the plaintiffs, who had alleged a title to the land as an accretion to their estate, to raise at the hearing of their appeal a different case, *viz.*, one simply of original ownership of the site of the lands reformed; and secondly, that, had such a title been properly pleaded, the evidence failed to establish the identification of the site. The case of *Mussamat Imam Bandi* v. *Hurgobind Ghose*[3] is cited in the judgment, which throws no doubt upon the validity of such a title if properly pleaded and proved. Again, the learned counsel for the respondents argued broadly that by diluviation into a navigable river, land is permanently lost to the original proprietor and becomes the property of the state; and in support of this proposition, they relied much on an American work 'Houck on Navigable Rivers,' which they argued was the more deserving of attention by reason of the similarity which exists between the great rivers of America and those of India in their conditions and mode of action. This authority, however, does not appear to their Lordships to assist the respondents' case. The law of alluvion in America seems to be less favourable to riparian proprietors than that of India or England. For Mr. Houck draws a distinction between estates consisting of a given quantity of land and defined by a mathematical line, though by one on the margin of a river, and those of which the river is the nominal boundary. He holds that in the former case alluvion, however small, and however gradually and imperceptibly formed, is the property of the state. And after dealing with this question, he says in s. 258,—'Nevertheless it is possible that by the action of the sea or a change of the channel of a river the land so granted may be partly lost. No doubt in case afterwards the land should be washed up again, it would belong to the former owner of the estate originally purchased, and no further. While, however, the land is submerged in the river, the title is in the state.' This is consis-

[1] 13 Moo. Ind. App., 467; 5 B L. R., 521; 14 Suth. W. R. (P. C.) 11.

[2] 12 Moo. Ind. App. 136; 2 B. L. R. (P. C.) 4; 11 Suth. W. R. (P. C.) 2.

[3] 4 Moo. Ind. App. 403; 7 Suth. W. R. (P. C.) 67; 2 B. L. R. (P. C.) 4

tent with the Civil law, Dig. lib. xli, tit i, s. xxx,[1] and with the law of England as declared in the passage cited in the case of *Lopez* v. *Muddan Mohan Thakoor*[2] from Hale 'De Iure Maris.'"

I have already shown that the proposition contended for by Mr. Houck, and which is referred to in this judgment, has not been accepted by the Courts in America.

Nature of cases to which the doctrine applies.—The doctrine under consideration applies equally, whatever the nature and situation of the land reformed may be; whether it appears as a contiguous accretion to an estate which was originally at the back of the diluviated site,[3] or as a contiguous accretion to an estate situated on the opposite bank of the river,[4] or whether it appears as an island in the middle of the river surrounded on all sides by unfordable water,[5] or in contiguity with another similar island, either belonging to Government or to a private individual.[6] In all such cases, the person who is the owner of the diluviated site remains the owner of the reformation.

Whether the site upon which reformation takes place was originally a part of a permanently-settled estate, or whether it was in itself an accretion and settled temporarily only, is immaterial.[7]

If, after reformation on an old site, an indefeasible title to the land has been acquired by a third person by adverse possession for the requisite period, the subsequent submergence and reappearance of that land, whether by a sudden or gradual change in the course of the river, cannot affect his title, nor does the right of the original owner revive in consequence of such an event.[8]

[1] *Supra*, 133, note 1.

[2] *Supra*, 158—159.

[3] 13 Moo. Ind. App. 467; 5 B. L. R, 521; 14 Suth W. R. (P. C.) 11.

[4] *The Court of Wards* v. *Radha Proshad Singh*, 22 Suth. W. R. 238; S. C. on appeal (Privy Council) I. L. R. 3 Cal. 796; 1 Cal. L. R. 259; *Hursahai Singh* v. *Syud Lootf Ali Khan* L. R., 2 Ind. App. 28; 23 Suth. W. R. 8; 14 B. L. R, 268; *The Collector of Moorshidabad* v. *Rai Dhunput Singh*, 23 Suth. W. R, 38; 15 B. L. R., 49.

[5] *Moneelal Sahoo* v. *The Collector of Sarun*, 6 B. L. R., App. 93; 14 Suth. W. R. 424; *The Collector of Rajshahi* v. *Rani Shama Soonduree Debia*, 14 B. L. R., 219; 22 Suth. W. R., 324; *Rani Sarat Soondures Debya* v. *Soorja Kanth Acharjya*, 25 Suth. W. R. 242; *Golam Ali Chowdhry* v. *The Collector of Backergunge* 2 Cal. L. R., 39.

[6] *Nogendra Chunder Ghose* v. *Mahomed Esoff*, 10 B. L. R. 406; 18 Suth. W. R. 113; *Buddun Chunder Shaha* v. *Beepin Behari Roy*, 23 Suth. W. R. 110;

[7] *Hursahai Singh* v. *Syud Lootf Ali Khan*, L. R. 2 Ind. App. 28; 23 Suth. W. R. 8; 14 B. L. R. 268.

[8] *Radha Proshad Singh* v. *Ram Coomar Singh*, I. L. R. 3 Cal. 796.

Modes in which a subsisting right to the site is evidenced.—But this doctrine of reformation on original site is subject to one important qualification, namely, that the original owner cannot claim a title to the reformation, if he has completely abandoned his rights to the diluviated site, and has no subsisting title thereto at the time when the lands reform. "Their Lordships," say the Privy Council in *Lopez* v. *Muddan Mohan Thakur*,[1] "however, desire it to be understood that they do not hold that property absorbed by a sea or river is, under all circumstances, and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the sea or river of the state, and so liable to the written law as to accretion and annexation."

The title to the submerged site subsists, if the revenue or rent, as the case may be, is continued to be paid in respect of it.[2] Payment of revenue or rent is no doubt the ordinary mode in which the continuance of the right is evidenced in such cases. But cases might happen with regard to lakheraj lands, exempt from the payment of revenue or rent, in which no such evidence could be availed of. How the subsistence of the right may be shown in such cases does not appear to have ever been decided. It is clear that mere identification of site by means of the survey and thak maps, which may be obtained at any distance of time, cannot afford any evidence of an intention to retain a right to the soil. In such cases, the presumption probably would be that the original owner retained a right to the soil, unless it were shown that some overt act had been done by him, indicating an intention on his part to abandon his right, or unless the reformation happened after a considerable lapse of time. What may amount to proof of abandonment will depend upon the circumstances of each particular case, but it is obvious that mere temporary remission of revenue under Act IX of 1847 does not amount to that complete renunciation of right to the site which would disentitle him to the lands reformed.[3]

Right of a purchaser of an island from Government to reformation on

[1] 13 Moo. Ind. App, 467; 5 B. L. R., 521; 14 Suth. W. R. (P. C.) 11.

[2] *Lopez* v. *Muddun Mohan Thakoor*, 13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 Suth. W. R. (P. C.) 11; *Nogendra Chunder Ghose* v. *Mahomed Esoff*, 10 B. L. R. 406; 18 Suth. W. R. 113; *Hemnath Dutt* v. *Ashgur Sirdar*, I. L. R., 4 Cal. 894.

[3] *The Court of Wards* v. *Radha Proshad Singh*, 22 Suth W. R. 238.

its diluviated site.—If an island thrown up in a large navigable river is resumed by Government under Act IV of 1868 (B. C.), and afterwards sold to a private individual, all the incidents of private ownership become annexed to such property; and, therefore, if it is subsequently diluviated, and again reforms on the same ascertainable site, although in contiguity with the estate of another person, the purchaser will be entitled to the reformation.

Doubtful case of reformation on old site.—But a somewhat nice and difficult problem may arise, if the island, after survey demarcations or the preparation of maps for the purposes of a temporary settlement, and while yet in the direct possession of Government or in the hands of its lessee or farmer for a fixed term, is diluviated, and afterwards reappears on the old site but now as an accretion annexed to an adjoining estate.

In favour of the title by accretion it may be contended that, as soon as the island in the direct possession of Government or of its lessee or farmer is diluviated, it becomes a part of the bed of the river, and lapses back into the 'public domain' or 'public territory' of the state so fully and completely that land may be 'gained' from it by gradual accession under clause 1, section 4 of the Regulation. Government does not pay revenue to any body, and consequently in the case I have supposed, the ordinary mode of evidencing an intention on the part of the former owner of a submergent site to preserve his right thereto cannot be obtained. It might also be argued that if it were otherwise, the beds of navigable rivers would, in the course of a century or so, be so much dotted over with the diluviated sites of islands which had originally belonged to Government, that the law relating to the acquisition of land by private individuals from the 'public domain' by means of gradual accession would be wholly nugatory and inoperative. But this may perhaps be open to the answer that as a rule Government does not retain islands in its direct possession for ever; it disposes of them in favour of private individuals as soon as their capabilities have been fully developed. If private ownership is thus once established, then no doubt, the right to the reformation follows as an ordinary incident of property, where the title to the site is subsisting.

Nature of proof of title to the site necessary.—Where a claim is based on the ground of reformation on original site, the title to the site must be strictly proved as in the case of any other suit in ejectment.[1]

[1] *The Collector of Dacca* v. *Kalee Churn Poddar*, 21 Suth. W. R. 446.

Therefore, if the title to the site is not proved to belong to the plaintiff, his suit must fail; or if a portion merely of the reformation occupies the site which originally belonged to him, he is entitled to recover such portion only and no more on the ground of reformation.

Right of a purchaser of an estate from Government to lands reformed on original sites under peculiar circumstances.—Again, if an island resumed by Government is mapped, either by the survey and thak officers, or by khas amins, and is found on measurement to contain a certain area, which is afterwards reduced (more or less) by diluvion during the period it remains in its direct possession, or in the possession of its farmers under temporary settlements, the latter paying for it in consequence of such diluvion a reduced rental in proportion to the diminished area; a purchaser of such island who buys under a certificate of sale which specifies the diminished area and the reduced rental, is not entitled to claim either against Government[1] or against any other person in possession,[2] more land than what is actually reformed on the site containing such reduced area. The question in such a case is one of construction of the certificate of sale, and not one of accretion or reformation. If there is any ambiguity in such certificate, the map and the settlement proceedings preparatory to the sale, and even the advertisement of sale may be referred to for the purpose of determining the situation and exact quantity of the land included in the purchase.

Illustration thereof.—Suppose, for instance, when Government takes possession of an island under section 3 of Act IV of 1868 (B. C.), it causes the island to be mapped and measured, whereby it is found to consist of five thousand acres. Afterwards, it is let out in farm for ten years at a rental of, say, five thousand rupees per annum. Diluvion takes place during the currency of the lease, and on its expiration the island is mapped and measured again and found to consist of three thousand acres. The lease is then renewed for a term of five years at a reduced rental of three thousand rupees per annum. Further diluvion takes place during this period, and on the expiry of the second

[1] *Kristo Mohan Bysack* v. *The Collector of Dacca*, 24 Suth. W. R. 91; *Golam Ali Chowdhry* v. *The Collector of Backergunge*, 2 Cal. L. R., 39.

[2] *Ranee Surnomoyee* v. *Watson & Co.*, 20 Suth. W. R. 11; *Ranee Surnomoyee* v. *Jardine Skinner & Co.*, 20 Suth. W. R. 276; *Juggobundhu Bose* v. *Koomoodinee Kant Banerjee*, 19 Suth. W. R. 89; Dist. *Radhica Mohun Roy* v. *Gunga Narain Chowdhry*, 21 Suth. W. R. 115; on review, 22 Suth. W. R. 230.

lease it is mapped and measured for the third time and is found to comprise a thousand acres, which is then let out for a year at an yearly rental of one thousand rupees. At the end of this third lease, the island is sold, the only description in the certificate of sale, as is usual in such cases, being (*a*) the name of the island, (*b*) the number which the estate bears on the Collector's register (and which was put upon it at the time when the island was resumed), and lastly (*c*), the yearly revenue which has to be paid for it. After some years the island is again diluviated either wholly or in part, but subsequently the entire quantity of five thousand acres reforms on its original site. To how much of this reformation is the purchaser entitled? The number of the estate refers to an area of five thousand acres, but the revenue is attributable to an area of one thousand acres only. Under such circumstance, the first two elements are treated as mere matters of description, and the third is taken as the only essential element, which controls the former and determines the precise quantity comprised in the purchase. The purchaser, therefore, in such a case as this is held entitled to recover from any person who may have been holding possession of it without any title, one thousand acres only.

VI. Custom.—Regulation XI of 1825, s. 2.—The rules relating to the law of alluvion and diluvion as well as the doctrine of reformation on old site, which we have hitherto discussed, are subject again to one sweeping exception—to one paramount proviso, enacted by section 2 of the Regulation which runs thus:—

"Whenever any clear and definite usage of shikast paiwast respecting the disjunction and junction of land by the encroachment or recess of a river may have been immemorially established for determining the rights of the proprietors of two or more contiguous estates divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river by encroachment on one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage."

It is clear from the language of the Regulation that, whatever the nature of the change in the course of a river may be, whether it be sudden or whether it be gradual, whether the channel shifts in such a way as to cut off a portion of a riparian estate, the cultivated fields, trees and houses and all other landmarks remaining intact, or whether it encroaches

upon a riparian estate so completely that portions of it reform on the opposite bank on the clearly identifiable site of the diluviated property, the main channel of the river will form the constant boundary between the estates on either side, if a clear and immemorially established local usage can be proved.

The mere statement of this proposition is enough to show that such a usage, wherever it exists, cannot but operate very harshly on riparian proprietors, who lose by it. No instances of such local usage are to be found in Lower Bengal. In Behar wherever such local usage has been set up, the decisions of the Privy Council show that the attempt has invariably failed. In the North-Western Provinces some traces of this local usage are to be found, and there it is known by the so-called custom of Dhardhura. But the Punjab is pre-eminently the place where such usage or custom has extensive operation.

Different kinds of usages in the Punjab.—This usage in the Punjab has three different kinds. The first, called the deep-stream rule, is known by various local names, *e. g*, had sekandari, kishtibanna or kach-mach. According to it, lands transferred from one side of the stream to the other, change owners even though such lands remain intact or be identifiable; and islands or alluvial lands belong to the owner of the nearest bank on the same side of the stream, without reference to former ownership of site. The second is a modified form of the first, and is perhaps most common. Although the deep-stream, according to it, is ordinarily regarded as a constant boundary of the riparian villages, the extreme rigour of it is somewhat softened by making it inapplicable to the case where the land transferred is identifiable, that is, recognisable by physical features or visible landmarks. The third kind is known as warpar, under which the boundaries of opposite riparian estates are assumed to be permanently fixed in the river-bed; so that whatever changes may take place in the course of the deep-stream, they do not at all affect the ownership of the soil. The first two kinds of usage prevail more or less on the bank of all the Punjab rivers except the Indus. The third is in force in all villages on the banks of the Indus, and is to be found, though not as often as the other two deep-stream rules, on the banks of other rivers also.

It may be observed that, though the second form of the deep-stream rule is apparently more equitable than the first in theory, in practice it is almost as unsatisfactory as the other. The question, whether a plot of land is recognisable or not, that is, whether it is an old bank, or island

rather damaged by flood-water, or a newly formed bank or island is often a fine one and not very easy to decide.

Usage must be clear and definite—Usage merely local.—It is manifest that the usage or custom in order to be effectual must be 'clear and definite,'[1] and the person setting it up must, by clear and positive proof, establish its immemorial existence.[2] The language of the Regulation itself implies that the custom to be proved is a local custom. Existence of the custom on the banks of one river is no evidence that a similar custom obtains on the banks of another;[3] nor does the fact that a river is the constant though fluctuating boundary between two zillahs or districts, show that it is also the constant boundary between any two riparian estates in such districts.[4]

Baboo Bissessur Nath v. Maharajah Mohessur Buksh Sing Bahadur.—An illustration of the first form of the deep-stream rule, though not in connection with any of the rivers in the Punjab, may be found in the case of *Babu Bissessur Nath* v. *Maharaja Mohessur Buksh Sing Bahadur*,[5] where a closely similar custom was set up with regard to that portion of the river Ganges where it separates the district of Sahabad from that of Sarun. It was alleged in that case, that a large tract of land, which had at one time been alluvial, but which had for a great number of years been regularly cultivated and inhabited, lying between two branches of the Ganges, or, more properly, between two rivers, the Dewa and the Ganges, became, according to custom which prevailed in the locality, the property of the owner of the banks of the Ganges or of the Dewa, accord-

[1] *Babu Bissessur Nath* v *Maharajah Mohessur Buksh Sing Bahadur*, L. R. Ind. App. Supp. Vol. 34; 11 B. L. R. 265; 18 Suth. W. R. 160.

[2] *Rai Manick Chand* v. *Madhoram*, 13 Moo. Ind. App. 1; 3 B. L. R. (P. C.) 5; 11 Suth. W. R. (P. C.) 42; *Babu Bissessur Nath* v. *Maharajah Mohessur Buksh Sing Bahadoor*, L. R. Ind. App. Supp. Vol. 34; 11 B. L. R. 265; 18 Suth. W. R. 160.

[3] *Ibid.*

[4] *Rai Manick Chand* v. *Madhoram*, 13 Moo. Ind. App. 1; 3 B. L. R. (P. C.) 5; 11 Suth. W. R. (P. C.) 42; *Baboo Bissessur Nath* v. *Maharajah Mohessur Buksh Sing Bahadoor*, L. R. Ind. App. Supp. Vol. 34; 11 B. L. R. 265; 18 Suth. W. R. 160; *Maharajah Rajendur Pertab Sahee* v. *Lalljee Sahoo*, 20 Suth. W. R. 427; *Rughoobur Dyal Sahoo* v. *Kishen Pertab Sahee*, L. R. 6 Ind. App. 211; 5 Cal. L. R. 418; *Harpal Koonwari* v. *Ubruck Singh*, 4 N.-W. P. Rep. (C. A.) 18. The custom of Dhardhura was discussed in the following cases:—*Nasiruddin Ahmed* v. *Mussamut Umadi*, 4 N.-W. P. Rep. (C A.) 1; *Mussamat Rani Katiyani* v. *Sheikh Mahomed Sharf-ud-din* 4 N.-W. P. Rep. (C. A.) 189; *Isri Sing* v. *Mirza Sharf-ud-din* 1 N.-W. P. Rep. (N. S.) 224; *Dhoolhin Koonwaree* v. *Ubruck Singh*, 3 Agra, 18.

[5] L. R. Ind. App. Supp. Vol. 34; 11 B. L. R. 265; 18 Suth. W. R. 160.

ing as the channel of the Ganges happened, for the time being, to be fordable and that of the other deep, or vice versâ. The Privy Council in their judgment said:—"It should be observed that this custom appears to be based on the hypothesis that at all times one channel is deep, and the other fordable, because it could not apply if both were deep or both were fordable; it would also appear that this custom is wholly independent of any question of accretion or arrosion of banks; that it attaches merely upon the water becoming deeper or shallower in one channel or the other, without necessarily any alteration in the beds or banks of the channels." Their Lordships added:—"This being the custom which it appears to their Lordships that the plaintiffs are bound to make out in order to establish their case, their Lordships would require to be satisfied by very clear and distinct evidence of its existence, since the operation of such a custom must be to render the rights of property fluctuating and precarious. A question has indeed been suggested, whether a custom of this description falls within the terms of Regulation XI, section 2. Their Lordships, however, do not think it necessary to decide this question, inasmuch as they have come to the conclusion that no clear and definite usage, such as would be necessary to support the plaintiff's case, has been in point of fact established by the plaintiffs."

LECTURE IX.

ALLUVION AND DILUVION.—(*Continued*).

(*Anglo-Indian Law.*)

VII. (*a.*) Assessment of revenue on alluvial increments—Substantive law and procedure laid down in the Regulations for such assessment—Procedure for resumption of islands separated from the banks by unfordable channels—Act IX of 1847—Whether before the passing of that Act, land reformed on the original site of a permanently-settled estate was liable to further assessment—Whether such reformation is liable to assessment since the passing of Act IX of 1847—Discussion of authorities—*Fahamidannissa Begum* v. *The Secretary of State for India*—Settlement of alluvial increments with whom to be made by Government—Provisions of Act IX of 1847 inapplicable to alluvial increments annexed to estates held by Government as zamindar—(*b.*) Assessment of rent on alluvial increments—Law relating thereto as it stood prior to the Bengal Tenancy Act—Clause 1, section 4 of Regulation XI of 1825—Liability of holders of subordinate tenures created after the Permanent Settlement to pay additional rent for increments—Whether holders of subordinate tenures existing at the time of the Permanent Settlement were liable to pay enhanced rent for increments—Procedure for assessment of additional or enhanced rent for increments—Whether reformations were liable to be assessed with additional rent—Rate at which additional rent was assessable on increments liable to pay additional rent—Abatement of rent for lands lost from a talook or an occupancy—holding by diluvion—Sections 50 and 52 of the Bengal Tenancy Act—Effect of the new law upon the old rulings.

VIII. Possession of alluvial increments, islands or submergent lands, and the rules of limitation applicable thereto—Proof of possession of land covered with water—Period from which limitation begins to run in a suit to recover possession of an alluvial increment—Enumeration of the several forms in which a suit to recover possession of a reformation on original site may arise—Discussion of the law of limitation with regard to each of them—*Mano Mohun Ghose* v. *Mothura Mohan Roy*—*Mahomed Ali Khan* v. *Khaja Abdool Gunny*—*Kally Churn Sahoo* v. *The Secretary of State for India.*

I have disposed of the principal heads of the division under which I proposed to consider the Anglo-Indian law of alluvion and diluvion. It remains for me now to deal in this lecture with the last two, or the subsidiary, heads, namely :—

VII. Assessment of revenue or rent on alluvial increments, including islands separated from the mainland by fordable channels.

VIII. Possession of alluvial increments, islands or submergent lands, and the rules of limitation applicable to them.

VII. The topics comprised in the first of these heads may be conveniently dealt with under the two following subdivisions, namely :—

(*a.*) Assessment of revenue on alluvial increments added to estates held directly under Government, and

(*b.*) Assessment of rent on alluvial increments added to under-tenures or other subordinate interests held under zamindars or tenure-holders.

Assessment of revenue on alluvial increments.—Now as regards (*a*), that is, assessment of revenue on alluvial increments. The substantive law on this matter is contained in the preamble of Regulation II of 1819 and clause 1, section 3 of that Regulation. That clause declared and enacted, among other things, that all churs and islands formed since the period of the Decennial Settlement and generally all lands gained by alluvion or dereliction since that period, whether from an introcession of the sea, an alteration in the course of rivers, or the gradual accession of soil on their banks, were, and should be, considered liable to assessment in the same manner as other unsettled mehals, and the revenue assessed on all such lands, whether exceeding one hundred bighas or otherwise, should belong to Government.

The procedure under which the assessment of such alluvial increments was to be made and the rules for the adjudication of various questions which might arise in the course of such assessment, were laid down by Regulation VII of 1822 for the temporarily settled districts, and by Regulation IX of 1825 for the permanently settled districts; and special tribunals under the designation of Special Commissioners were created in certain districts by Regulation III of 1828, with exclusive jurisdiction to hear appeals from the decisions of revenue authorities, for the speedy disposal of questions relating to the liability to assessment, as well as the actual mode of assessment, of such increments and also of other lands falling within the scope of Regulation II of 1819 and Regulation IX of 1825.

The jurisdiction of the Special Commissioners as well as of the Collectors and Deputy Collectors, to determine the liability of lands gained from the sea or from rivers by alluvion or dereliction, to assessment for Government revenue, was abolished by Act IX of 1847, which enacted that no measures for the assessment of such lands, or for the assertion of the right of Government to the ownership thereof, should thereafter be taken except under the provisions of that Act.

The main object of Regulation XI of 1825 was to provide rules for the determination of the rights of Government and of private individuals

respectively, to lands gained from the sea or from rivers by alluvion or dereliction. But while laying down these rules, it took occasion to re-assert at the same time the right of Government to assess revenue on such lands, in those cases where they were to be considered as acquisitions by private individuals; for clause 1, section 4 of that Regulation, after enacting that, land gained by gradual accession should be considered an increment to the tenure of the person to whose estate it became annexed, and that, the right to such increment was to be co-extensive with the right in the parent estate, lays down as a proviso: "that the increment of land thus obtained ..... shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue, to which it may be liable under the provisions of Regulation II, 1819, or of any other Regulation in force." Clauses 3 and 4 of the same section, the one relating to the ownership of islands separated from the shore or bank by fordable channels, and the other, to the ownership of sandbanks or churs thrown up in small and shallow rivers were also made subject to similar provisoes.

Procedure for resumption of island separated from the banks by unfordable channels.—The enactment contained in these provisoes has no application, however, to islands thrown up in large and navigable rivers, which, at the time of their appearance above water, are separated from the mainland by unfordable channels; for these being, under clause 3, section 4 of Regulation XI of 1825 'at the disposal of Government,' may be either retained khas or dealt with by Government in any way it chooses. The procedure for the 'resumption' of such islands was at first regulated by clause 12, section 5 of Regulation IX of 1825. It was repealed by section 7 of Act IX of 1847, which again in its turn has been repealed, and a new procedure, somewhat resembling the original one laid down by the Regulation, has been substituted for it by Act IV of 1868 (B. C.). Section 3 of that Act enacts that "whenever it shall appear to the local revenue authorities that an island has been thrown up in a large and navigable river liable to be taken possession of by Government under clause 3 section IV of Regulation XI of 1825 of the Bengal Code, the local revenue authorities shall take immediate possession of the same for Government, and shall assess and settle the land according to the rules in force in that behalf, reporting their proceedings forthwith for the approval of the Board of Revenue, whose order thereupon, in regard to the assessment, shall be final. Provided, however, that any party aggrieved by the

act of the revenue authorities in taking possession of any island as aforesaid, shall be at liberty to contest the same by a regular suit in the Civil Court." After possession of such islands has been assumed by the revenue authorities on behalf of Government, in accordance with these provisions, they are either held khas or let out in farm, according to the procedure laid down by Regulation IX of 1825 in the permanently-settled districts, and by Regulation VII of 1822 in the temporarily-settled districts, or, as it is sometimes done, sold to private individuals with the reservation of a revenue fixed in perpetuity.

Provisions of Act IX of 1847.—Under the first subdivision, therefore, I have to deal with the assessment of revenue on such lands gained from the sea or from rivers by alluvion or dereliction, as may either be in actual contact with private estates (riparian or insular), or separated from them by fordable channels.

Act IX of 1847 provides, among other things, rules for the assessment of such alluvial formations within the provinces of Bengal, Behar and Orissa.

Section 3 of that Act enacts that the Government of Bengal may, in all districts or parts of districts of which a revenue survey may have been or may hereafter be completed and approved by Government, direct from time to time, whenever ten years from the approval of any such survey shall have expired, a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last previous survey, and cause new maps to be made according to such new survey.

Section 4 declares the dates on which the surveys of certain districts or parts of districts shall be taken to have been approved.

Section 5 enacts that whenever on inspection of any such new map, it shall appear to the local revenue authorities that land has been diluviated from any revenue-paying estate, they shall make a deduction from the sudder jumma of the said estate equal to so much of the whole sudder jumma of the estate as bears to the whole the same proportion, as the mofussil jumma of the land lost bears to the mofussil jumma of the whole estate; but if the moffusil jumma of the whole estate or of the land lost, cannot be ascertained to the satisfaction of the local revenue authorities, then the said revenue authorities shall make a deduction from the sudder jumma of the estate equal to so much of the whole sudder jumma of the estate as bears to the whole the same proportion as

the land lost bears to the whole estate. And this deduction, with reasons thereof, shall be forthwith reported by the local revenue authorities for the information and orders of the Sudder Board of Revenue, whose orders thereupon shall be final.

Section 6 enacts that whenever, on inspection of any such new map, it shall appear to the local revenue authorities that land has been added to any revenue-paying estate, they shall assess the same with a revenue according to the rules in force[1] for assessing alluvial increments, and shall report their proceedings forthwith to the Sudder Board of Revenue whose orders thereupon shall be final.

These provisions, to what and how far applicable.—The language of the last two sections clearly shows that they apply merely to lands added to or lost from estates belonging to private individuals; and the legitimate inference arising from an interpretation of these sections, taken in connection with section 3 of the Act, is that no additional revenue can be assessed on lands gained, nor remission of revenue granted for lands lost, to such estates, until a second survey of the same has been made under the provisions of the latter section. The Act provides no machinery for allowing an abatement of revenue where the land was covered with water at the time of the original survey.[2] But the Act does not preclude Government, whenever land is added by accretion to an estate owned by it in the capacity of a zemindar, to assess revenue on such land;[3] or, for similar reasons, whenever land is washed away from such estate, to grant remission of revenue without waiting for the period of a re-survey.

As regards abatement of revenue to be granted under section 5 of the Act on the ground of diluvion, it is clear upon the authorities that the determination by the Board of Revenue, as to the amount of abatement, is final and cannot be contested by a suit in the Civil Court.[4]

It is equally clear that the order of the Board of Revenue passed under section 6 of the Act with regard to the assessment of revenue on

[1] See Act XXXI of 1858, which, among other things, empowers revenue authorities to make a permanent or temporary settlement of the alluvial increment, and either assess a separate revenue on it or incorporate the same with the revenue of the parent estate, according as they think fit.

[2] *Secretary of State for India* v. *Fahamidunnissa Begum*, L. R. 17 Ind. App. (40) 52; I. L. R. 17 Cal. (590) 603.

[3] *Obhoy Churn Chowdhry* v. *The Collector of Dacca*, 4 Suth. W. R. (C. R.) 59.

[4] *Fahamidunnissa Begum* v. *The Secretary of State for India*, I. L. R. 14 Cal. (67) 97.

increments annexed to an estate by alluvion, when such increment is a 'gain' from the sea or from rivers by alluvion or dereliction since the period of the Permanent Settlement is also final, and that the Civil Court has no jurisdiction to set it aside.[1]

Whether prior to Act IX of 1847, land reformed on the original site of a permanently-settled estate was liable to further assessment.—But suppose the land which appears to be added to an estate by alluvion is really a reformation on the diluviated site of the whole or any portion of an estate, that is to say, a reformation within the ascertainable boundaries of an estate as they existed at the time of the Permanent Settlement, and the revenue of such estate has continued to be paid to Government for the entire land comprised within such boundaries. Is Government entitled to assess revenue on such reformed land? Under the law as it stood before the passing of Act IX of 1847, there could be no doubt that Government was not entitled to do so, for although clause 2, section 3 of Regulation II of 1819 declared the right of Government to assess to revenue all churs and islands formed since the period of the Decennial Settlement, and generally all lands gained by alluvion and dereliction since that period, yet at the same time clause 2 of section 31 of the same Regulation declared and enacted that, all claims by the revenue authorities on behalf of Government to additional revenue from lands, which were at the period of the Decennial Settlement included within the limits of estates for which a Permanent Settlement had been concluded, whether on the plea of error or fraud "or on any pretext whatever"—with the exception of lands expressly excluded from the operation of the settlement such as lakheraj and thanadari lands, should be considered wholly illegal and invalid. It is impossible to affirm after the decisions of the Privy Council in the case of *Lopez* v. *Muddan Mohan Thakoor*[2] and that of *Nogendra Chunder Ghose* v. *Mahomed Esoff*,[3] that land reformed on the ancient site of a permanently-settled estate is land 'gained' from the sea or river by alluvion or diluvion by the owner of such estate since its Permanent Settlement, or that it is land other than that which was at the time of the Permanent Settlement included within the limits of such estate.

It is equally clear that if the revenue authorities assessed additional revenue on such lands, proprietors of estates had a right to contest

[1] *Fahamidunnissa Begum* v. *The Secretary of State for India*, I. L. R. 14 Cal. (67) 97.

[2] 13 Moo. Ind. App. 467; 5 B. L. R. 521; 14 Suth. W. R. (P. C.) 11.

[3] 10 B. L. L. 406; 18 Suth. W. R. 113.

their liability to such assessment, originally by a suit instituted for that purpose in the Civil Court, and afterwards, under the provisions of a later enactment (Reg. III of 1828), by an appeal preferred to the Civil Court directly from the decisions of the revenue authorities considered as Courts of First Instance, on the ground that those lands formed an integral portion of estates for which settlements had been concluded with them in perpetuity, and that the imposition of fresh assessment in respect thereof had been expressly forbidden by the law. For clause 1 of section 31 of Regulation II of 1819, after providing that nothing in that Regulation should be considered to affect the rights of proprietors of estates, for which a permannent settlement had been concluded, to the full benefit of waste lands included within the boundaries of the estate which may have been since reduced into cultivation, proceeded to enact as follows:—"The exclusive advantages resulting from the improvement of all such lands were guaranteed to the proprietors by the conditions of that settlement, and it being left to the Courts of Judicature to decide in all contested cases, whether lands assessed under the provisions of this Regulation were included at the period of the Decennial Settlement within the limits of estates for which a settlement has been concluded in perpetuity, and to reverse the decision of the revenue authorities in any case in which it shall appear that lands which actually formed, at the period in question, a component part of such an estate, have been unjustly subjected to assessment under the provisions of the Regulation, *the zamindars and other proprietors of land will be enabled, by an application to the Courts, to obtain immediate redress in any case in which the revenue authorities shall violate or encroach on the rights secured to them by the Permanent Settlement.*"

Whether since Act IX of 1847 a reformation is liable to further assessment.—But then when one comes to consider the effect of the provisions of Act IX of 1847 upon this question, he is confronted by no small difficulty.

A literal construction of the language used in section 6, which has been already referred to, induced the High Court of Calcutta in *Dewan Ram Jewan Singh* v. *The Collector of Shahabad*[1] and in *Ram Jewan Sing* v. *The Collector of Shahabad*,[2] to hold that if a comparison of the new survey map of an estate prepared under section 3 of the Act with the next preceding survey map of the same estate (which, for the purposes of section 6 must be taken to be conclusive evidence as to the original limits

[1] 18 Suth. W. R. 64; 14 B. L. R. 221 (note.) [2] 19 Suth. W. R. 127.

of each permanently-settled estate), shewed that land had been added to an estate by alluvion, notwithstanding that it was really a reformation on the original site of that estate, and for which revenue has continued to be paid without abatement since the Permanent Settlement, the orders of the Board of Revenue, with regard to the assessment of such land were final, and that the Civil Court had no jurisdiction to interfere. Upon the rule thus laid down, a qualification, however, was engrafted in *Collector of Moorshedabad* v. *Roy Dhunput Sing*,[1] *Narain Chunder Chowdhry* v. *Taylor*,[2] and in *Sarat Sundari Debi* v. *The Secretary of State for India*[3] to the effect that, if the revenue authorities in any instance acted without jurisdiction in the matter of such assessment, section 6 did not debar the Civil Court from taking cognizance of a suit to set aside the ultimate order of the Board of Revenue, though as regards the determination of the extent of the assessable lands under Act IX of 1847 by a sole reference to the survey maps, the action of the revenue authorities was within the legitimate scope of their jurisdiction. The same cases introduced a further limitation, namely, that so long as the order of the Board of Revenue with regard to the liability of alluvial increments to assessment and the actual assessment itself was accepted as final, there was nothing to prevent a private individual from bringing a suit in the Civil Court for recovery of possession, on the ground that such increment was a reformation on the diluviated site of his estate, and for a declaration that by virtue of such a title he had a preferable claim to the settlement. There existed some difference of opinion as to whether Government should or should not be made a party to such a suit.

Fahamidunnissa Begum v. The Secretary of State for India.—This was the state of the authorities bearing upon the provisions of Act IX of 1847, when in *Fahamidunnissa Begum* v. *The Secretary of State for India*,[4] a Division Bench of the Calcutta High Court, finding itself unable to accept the exposition of law contained in them, referred to a Full Bench of the same Court for determining the two following question, namely :—

(*a*.) Whether the provisions of Act IX of 1847 are applicable to land reformed on the site of a permanently-settled estate, the revenue of which estate has been paid without abatement since the Permanent Settlement.

(*b*.) Whether, if these provisions are not so applicable, a Civil

[1] 15 B. L. R. 49; 23 Suth. W. R. 38.
[2] I. L. R. 4 Cal. 103; 3 Cal. L. R. 151.
[3] I. L. R. 11 Cal. 784.
[4] I. L. R. 14 Cal. 67.

Court has jurisdiction to review the decision of the Board of Revenue and to declare that the proceedings of the revenue authorities in assessing such land were ultra vires.

The majority of the Full Bench held that by the substantive law contained in the preamble and section 3 of Regulation II of 1819, no land, alluvial or otherwise, included in a permanently-settled estate was liable to further assessment; that the Revenue Courts in trying and determining under the Regulations the question regarding the liability of any particular land to assessment exercised judicial functions, just as much as the ordinary Civil Courts and the Courts of Special Commissioners, which reviewed these decisions of the Revenue Courts on appeal, did; that the effect of Act IX of 1847, among other things, was to take away from the Revenue Courts (including the Board of Revenue) such judicial functions, and to deprive them of their power of giving any binding decision in respect of the liability or otherwise of alluvial increments to assessment; and that, as a consequence necessarily involved in this position, it was left open to the Civil Courts to enquire whether in any particular instance the Revenue Courts had exceeded their jurisdiction by assessing lands which under the law were not liable to be assessed, although in regard to lands which were assessable under the law, the determination of the amount, when made by the Board of Revenue, was final. The majority of the Judges further held that the operation of section 9 of the Act should be limited to suits for damages on account of anything done in good faith by Government or its officers in the exercise of the powers conferred by that Act.

From this conclusion, however, Mitter, J., dissented, substantially upon the ground that, though lands reformed on original sites included within the limits of estates for which a permanent settlement had been concluded, did not fall within the category of 'lands gained from the sea or from rivers by alluvion or dereliction' since the period of that settlement, regarding the assessment of which alone Act IX of 1847 was passed, yet the Civil Courts had no jurisdiction to interfere with the assessment by the Board of Revenue of alluvial increments reformed on the original sites of such estates; because Act IX of 1847 merely abolished such special tribunals as the Special Commissioners and the officers vested with the power of resumption under Regulation III of 1828, and did not affect the judicial functions of the revenue officers determining under Regulation II of 1819 the liability of land to assessment; whereby the finality attached by section 6 of Act IX

of 1847 to the orders of the Board of Revenue upon the proceedings of the revenue officers had the same effect as the finality of an ordinary judicial decision, and was therefore not liable to be impeached in a Civil Court.

From this judgment the Secretary of State for India preferred an appeal to the Privy Council,[1] which after two hearings (the second of them being attended by six members), affirmed the ultimate decision arrived at by the majority of the Full Bench, though they assigned different reasons for their opinion. They held that, a review of the legislation prior to 1847 made it clear that whilst it was intended to bring under assessment lands not included in a Permanent Settlement, whether they were waste or gained by alluvion or dereliction, all such lands as were comprised in permanently-settled estates were to be rigorously excluded from further assessment; that, in addition to this, the proprietors of such estates were assured by clause 1 of section 31 of Regulation II of 1819, that they could protect themselves against any action of the revenue authorities which would tend to infringe upon their rights by appeal to the Civil Court; that lands reformed on the original site of a permanently-settled estate for which the full assessment has continued to be paid, was not 'land gained from the sea or from rivers by alluvion or dereliction,' for the assessment of which alone Act IX of 1847 had been expressly enacted; that that Act being therefore inapplicable to such land, the previous enactments did not cease to have effect with regard to it, so that it was still open to the Civil Courts under clause 1 of section 31 of Regulation II of 1819 to review the orders of the Board of Revenue, and to declare that the proceedings of the revenue authorities in assessing such land were ultra vires; and that the words used in the Act were not sufficient to take away that jurisdiction from the Civil Courts.

With whom settlement of alluvial increments are to be made by Government.—The right of Government is limited merely to the assessment of revenue on alluvial increments. It cannot refuse to enter into settlement with one who is declared by the Civil Court to be the rightful owner of such increment. If Government does make a temporary settlement of such increment with a wrong person, and the real owner recovers possession of it by a suit against the latter, Government is bound to accept the result of such litigation and to settle the revenue with the person who is declared to be the real owner in such suit.[2]

[1] *Secretary of State for India* v. *Fahamidunnissa Begum*, L. R. 17 Ind. App. 40; I. L. R. 17 Cal., 590.

[2] *Mooktakeshee Debia* v. *The Collector of Burdwan*, 12 Suth. W. R. 204.

It has been held that the provisions of Act IX of 1847 do not apply to the settlement of alluvial increments annexed to estates held by Government in its capacity of a zemindar.[1]

Assessment of rent on alluvial increments—Law relating thereto as it stood prior to the Bengal Tenancy Act.—We have next to deal with the subject relating to the (*b*) assessment of rent on alluvial increments.

I propose in the first place to consider the law upon this branch as it stood before the passing of the Bengal Tenancy Act, (Act VIII of 1885). The proviso to clause 1, section 4 of Regulation XI of 1825 after enacting that the increment of land obtained by gradual accession should not in any case be understood to exempt the holder of it from the payment of Government revenue in respect thereof, ran as follows :—

"Nor if annexed to a subordinate tenure held under a superior landholder, shall the under-tenant, whether a khudkhast ryot holding a maurisi istimrari tenure at a fixed rate of rent per bigha or any other description of under-tenant liable by his engagements or by established usage to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable."

In this proviso no distinction is made between a subordinate tenure or dependent taluk existing at the time of the Permanent Settlement, and a subordinate tenure created after the Permanent Settlement; and the non-exemption from the liability to pay increased rent for the increment is restricted to those cases only, where the under-tenant is, by his engagements or by established usage liable to pay additional rent for the land annexed to his tenure by alluvion.

Liability of holders of subordinate tenures created after the Permanent Settlement to pay additional rent for increments.—With regard, therefore, to subordinate tenures created after the Permanent Settlement, where the express terms of the engagement provided for the payment of increased rent for alluvial increments, or where, in the absence of such engagement, the liability for such payment was by established usage imposed on the tenure as an incident, the law was clear enough.[2] In those cases where no such engagement existed, nor

[1] *Obhoy Churn Chowdhry* v. *The Collector of Dacca*, 4 Suth. W. R. (C. R.) 59.

[2] *Babu Gopal Lal Thakur* v. *Kamar Ali*, 6 Suth. W. R. (Act X) 85; *Ramnidhee Manjee* v. *Parbutty Dasi*, I. L. R. 5 Cal. 823; 6 Cal. L. R. 362; sub. nom. *Shorussoti Dasi* v. *Parbutti Dasi*.

could any established usage be proved, that any difficulty could arise. There was a dictum of the Privy Council in *Soorasoondari Debea* v. *Golam Ali*,[1] to the effect that, even in such cases the holder of the subordinate tenure was liable under this proviso to be assessed with additional rent for the increment annexed to his tenure; and, in fact, in a subsequent suit[2] between the same parties for assessment of rent for the same alluvial land, which had formed the subject of the previous enhancement suit in which the above dictum was pronounced, the tenant did not even contest his liability to pay additional rent for the increment, but confined his objection solely to the rate at which the rent was to be assessed.

Whether holders of subordinate tenures existing at the time of the Permanent Settlement were liable to pay enhanced rent for increments.—A more difficult question, however, was, whether a dependent talookdar, who is either actually or presumptively shown to have held his talook at a fixed rent, which has not been changed since the time of the Permanent Settlement, is liable to enhancement or to pay additional rent for the increment added to his talook by alluvion, where no written engagement was forthcoming, nor was any established usage proved. Section 16 of Act VIII of 1869 B. C., (which corresponded to section 15 of Act X of 1859), enacted that the rent of such talooks should not be subjected to enhancement. The question therefore reduced itself to this,—whether the imposition of additional rent for the additional area under clause 1, section 4, Regulation XI of 1825, was or was not an enhancement of the rent of the talook within the meaning of that section. The point arose in *Juggut Chunder Dutt* v. *Panioty*,[3] where Bayley and Mitter, J.J., expressed an opinion in the affirmative, that is to say, to the effect, that the imposition of additional rent did amount to an enhancement of rent, but on review Mitter, J., retracted his former opinion, and declared that it should be taken as an obiter dictum. It would seem, therefore, that upon this point the law was not in a satisfactory state.

Procedure for assessment of additional or enhanced rent on alluvial increments.—In those cases where the increment annexed to a tenure or a holding was liable to be assessed with additional rent under the proviso to clause 1, section 4 of Regulation XI of 1825, to which I have already ad-

[1] 19 Suth. W. R 141; 15 B. L. R 125, note; on appeal from 9 Suth. W. R. 63.

[2] *Golam Ali* v. *Kali Krishna Tagore*, I. L. R. 7 Cal 479; 8 Cal. L. R. 517.

[3] 8 Suth. W. R. 427; 9 Suth. W. R. 379.

verted, it was held that the proper procedure for the landlord to follow was, not to sue for enhancement of rent under the Rent laws (Act X of 1859 or Act VIII of 1869, B. C.), but to sue for assessment of additional rent for the increment, such additional rent forming no part of the rent payable in respect of the parent tenure.[1] It was further laid down that such additional rent could not be recovered, unless a notice had been served upon the tenant under section 14 of Act VIII of 1869, B. C., informing him of the amount of rent sought to be imposed, and the grounds upon which it was claimed.[2] There was no express rule of law nor any decided case bearing upon the point, whether there could be assessment of additional rent upon land reformed on a site, which had previously been washed away, but for which the tenant had continued to pay rent without abatement. It would seem, however, that, according to the principles expounded in *Lopez's case*[3], additional rent could not be imposed on the tenant in such a case.[4]

Rate at which additional rent was assessable on increments liable to pay additional rent.—Then as regards the rate of rent at which the alluvial increment added to the tenure was to be assessed, it was held that a fair construction of the words "increase of rent to which he may be justly liable" in clause 1 section 4 of Regulation XI of 1825 warranted the conclusion that primâ facie, in the absence of any rebutting circumstances, it was to be assessed at the same rate of rent at which the parent tenure was held.[5]

A different rule probably would have to be applied if the parent tenure was held at a rack-rent, and the accreted land was of inferior quality, or if the parent tenure had been created at a low rate of rent for a large premium, or if the accreted land should be of superior quality than the original land.[6]

Abatement of rent for lands lost from a talook or an occupancy-holding by diluvion.—The right to claim reduction of rent of a talook for

[1] *Gopi Mohun Mozoomdar* v. *Hills*, 5 Cal. L. R. 33; *Ramnidhee Manjee* v. *Parbutty Dasi*, I. L. R. 5 Cal. 823; 6 Cal. L. R. 362; sub. nom. *Shorussoti Dasi* v. *Parbutti Dasi*.

[2] *Ramnidhee Manjee* v. *Parbutty Dasi*, I. L. R. 5 Cal. 823; 6 Cal. L. R. 362, sub. nom. *Shorussoti Dasi* v. *Parbutti Dasi*; *Brojendra Kumar Bhoomik* v. *Woopendra Narain Sing*, I. L. R. 8 Cal. 706; 10 Cal. L. R. 559, sub. nom. *Hurro Sunderi Dasi* v. *Gopi Sunderi Dasi*.

[3] 13 Moo. Ind. App. 467; 5 B. L. R. 512; 14 Suth. W. R. (P. C.) 11.

[4] Cf. *Hemnath Dutt* v. *Ashgur*, I. L. R. 4 Cal. 894.

[5] *Golam Ali* v. *Kali Krishna Tagore*, I. L. R. 7 Cal. 479; 8 Cal. L. R. 517.

[6] *Chooramoni Dey* v. *Howrah Mills Co.* I. L. R. 11 Cal. 696.

land lost by diluvion, would, primâ facie, depend upon the express engagement of the parties; but there existed some doubts as to whether, in the absence of any express engagement, such right could be claimed in respect of talooks created before the Permanent Settlement.[1] But with regard, however, to talooks created since the Permanent Settlement, it was held that such right clearly existed, unless it had been taken away by express stipulation. In *Assaruddin* v. *Sharashibala Debea*,[2] Sir Barnes Peacock, in delivering the judgment of the Court, adverting to the right of the talookdar to claim reduction of rent on account of diluvion, said:—"We think he is so entitled, unless there was an express stipulation that he should not, whether the land was washed away or not. If a man stipulates to pay rent, it is clear he engages to pay it as a compensation for the use of the land rented, and independently of section 15, Act X of 1859. We are of opinion that, according to the ordinary rules of law, if a talookdar agrees to pay a certain amount of rent, the tenant of it is exempt from the payment of the whole rent, if the whole of the land be washed away, or a portion of the rent, if a portion only be washed away."

The right of an occupancy-ryot to claim reduction of rent on the ground of diluvion was provided for by section 19 of Act VIII of 1869, B. C., (corresponding to section 18 of Act X of 1859), which ran thus:—'Every ryot having a right of occupancy shall be entitled to claim an abatement of the rent previously paid by him, if the area of the land has been diminished by diluvion or otherwise, &c."[3] A ryot who did not possess the right of occupancy, was held not entitled to claim such a right.[4]

Sections 50 and 52 of the Bengal Tenancy Act.—The latter portion of the proviso to clause 1, section 4 of Regulation XI of 1825, to which I have already referred, as well as Act X of 1859 and Act VIII of 1869

[1] *Ram Churn Bysack* v. *Lucas Theodorus Lucas*, 16 Suth. W. R. 279.

[2] Marsh. 558.

[3] Cf. *Inayatullah* v. *Ilahi Buksh*, Suth. W. R. 1864, (Act X) 42; *Raghunath Mundal* v. *Jagat Bundhu Bose*, 8 Cal. L. R. 393; *Sham Lall Sahoo* v. *Hady Bunjara and others*, 2 Hay. 522. An auction-purchaser of a holding was held entitled to claim abatement of rent on the ground of diluvion, even though his predecessor may have neglected to make such a claim. *Kali-prasanna Rai* v. *Dhananjay Ghose*, I. L. R. 11 Cal. 625. But a purchaser under a private conveyance was not so entitled, unless the deed expressly conferred on him that right. *Prasannamayi Dasi* v. *Dayamoyi Dasi*, 22 Suth. W. R. 275.

[4] *Shaikh Mohcem* v. *Shaik Ruheemotollah*, 2 Hay 433; Marsh. 341.

(B. C.) have been repealed, and the liability of every description of tenant to pay additional rent for land annexed to his tenure or holding by alluvion, as well as his right to claim reduction of rent for land lost from his tenure or holding by diluvion, is now regulated by the following sections of the Bengal Tenancy Act, which came into operation on the 1st November 1885. Section 50 runs thus :—

(1.) "Where a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be increased except on the ground of an alteration in the area of the tenure or holding.

(2.) "If it is proved in any suit or other proceeding under this Act that either a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement.

Section 52 provides as follows :—

(1.) "Every tenant shall—

(*a.*) be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him, unless it is proved that the excess is due to the addition to the tenure or holding of land which having previously belonged to the tenure or holding was lost by diluvion or otherwise without any reduction of the rent being made, and

(*b.*) be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him, unless it is proved that the deficiency is due to the loss of land which was added to the area of the tenure or holding by alluvion or otherwise, and that an addition has not been made to the rent in respect of the addition to the area.

(2.) In determining the area for which rent has been previously paid, the Court shall, if so required by any party to the suit, have regard to—

(*a.*) the origin and conditions of the tenancy, for instance, whether the rent was a consolidated rent for the entire tenure or holding ;

(*b.*) whether the tenant has been allowed to hold additional land in

consideration of an addition to his total rent or otherwise with the knowledge and consent of the landlord;

(*c.*) the length of time during which the tenancy has lasted without dispute as to rent or area; and

(*d.*) the length of measure used or in local use at the time of the origin of the tenancy as compared with that used or in local use at the time of the institution of the suit.

(3.) In determining the amount to be added to the rent, the Court shall have regard to the rates payable by tenants of the same class for lands of a similar description and with similar advantages in the vicinity, and, in the case of a tenure-holder, to the profits to which he is entitled in respect of the rent of his tenure, and shall not in any case fix any rent which under the circumstances of the case is unfair or inequitable.

(4.) The amount abated from the rent shall bear the same proportion to the rent previously payable as the diminution of the total yearly value of the tenure or holding bears to the previous total yearly value thereof, or, in default of satisfactory proof of the yearly value of the land lost, shall bear to the rent previously payable the same proportion as the diminution of area bears to the previous area of the tenure or holding."[1]

Section 3 defines tenant as "a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person;"

and section 5 classifies tenants thus:—

(1.) tenure-holders, including under-tenure-holders,

(2.) raiyats, and

(3.) under-raiyats, that is to say, tenants holding whether immediately or mediately under raiyats;

and subdivides raiyats into:—

(*a.*) raiyats holding at fixed rates,

(*b.*) occupancy-raiyats, and

(*c.*) non-occupancy raiyats.

Section 52 is apparently based on the principle that, addition to or subtraction from the rent, in consequence of a larger or a smaller area than that which the tenant has been paying rent for being found in his possession, whether in consequence of alluvion or diluvion, or otherwise,

[1] Under the old law the rule of proportion was the same as that prescribed by subsection (4). *Brajanath Pal* v. *Hira Lal Pal*, 1 B. L. R (A. C.) 87; 10 Suth. W. R. 120.

does not in reality amount to enhancement of the rent; and it is this which probably accounts for the displacement of that section from the group of sections relating to enhancement.

Effect of the new law upon the old rulings.—Whatever doubt there might have existed under the old law, as to whether a dependent talookdar who held his talook at a fixed rent from the time of the Permanent Settlement was, in the absence of any express engagement or local custom, liable to pay additional rent for land added to his talook by alluvion or to claim reduction of rent for land lost from his talook by diluvion, it is manifestly clear from the sections of the Bengal Tenancy Act I have just read, that he is now placed on the same footing as all other classes of tenure-holders, and is liable to pay additional rent or entitled to claim a reduction of rent, according as the case may be, for any alteration in the area of the talook by alluvion or diluvion.

It is equally clear from the express language of section 52 that land reformed on a site which had previously been washed away, but for which the tenant has continued to pay rent during its submergence, is not liable to pay additional rent.

Moreover, that section supplies an omission which had occurred in Regulation XI of 1825, as to the right of a dependent talookdar, whose talook had come into existence after the Permanent Settlement, to claim reduction of rent on the ground of diluvion. Every species of tenant, including even a non-occupancy raiyat, and an under-raiyat, is now under that section, as interpreted by section 4, entitled to claim reduction of rent on account of diluvion; and this again by clear implication establishes the right of a tenant from year to year to alluvial increment, a point upon which there existed some conflict of opinion before this legislation. Besides, the whole controversy regarding the rate of rent at which an alluvial increment was liable to be assessed, as well as the rate at which the deduction was to be allowed from the total rent on account of diluvion, is now set at rest by subsections 3 and 4 of the same section.

Furthermore, it is necessary to point out that the section itself contains no saving clause in favour of contracts between a landlord and a tenant with regard to the increase or reduction of rent in any of the circumstances mentioned therein. But the absence of such a clause from the section does not necessarily carry the inference that the legislature

intended to render the operation of the section uncontrollable by the terms of any contract. On the contrary, we find that section 179 of the Act clearly introduces such a qualification, at all events in the case where a permanent mokurari tenure is created; for it enacts that: "Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently-settled area from granting a permanent mokurari lease on any terms agreed on between him and his tenant." But as regards raiyats, section 178, subsection (3) clause (f) provides that: "Nothing in any contract made between a landlord and a tenant after the passing of this Act shall take away the right of a raiyat to apply for a reduction of rent under section 38 or section 52." The converse case of a landlord agreeing not to take from a raiyat additional rent for land found to be in excess of the area for which rent has been previously paid by him is not expressly provided for in the Act, nor does there appear to be anything in the Act itself to show what the effect of a contract between a tenure-holder for a term of years and his landlord upon this section would be. It would not perhaps be reasonable to hold that in the latter case the operation of contracts should be excluded.

In those cases where the operation of contracts is left unfettered by section 52 of the Bengal Tenancy Act, a covenant in a permanent mokurari lease to the effect that there shall be no increase or reduction of rent of the tenure in case of alluvion or diluvion, may sometimes expose the lessor, if he happens to be a proprietor holding directly under Government, to very serious consequences. The covenant absolutely debars him from ever afterwards assessing additional rent for any increment that may be added to the tenure by alluvion, and yet he is bound nevertheless under the revenue laws to pay to Government for such increment (which undoubtedly is an addition to his estate), additional revenue, which perhaps may go on increasing in amount as the increment enlarges in area. This is a result which ought to induce Courts of Justice to put a strict construction upon the terms of such a covenant, and make them refuse to give effect to it unless the intention of the parties appear to be so clear and manifest as to compel them to do so.

VIII. Possession of alluvial increments, islands, or submergent lands, and the rules of limitation applicable to them—Proof of possession of land covered with water.—As to the proof of possession of land covered with water, Garth, C. J., thus observes in *Mohiny Mohun Das* v. *Krishno Kishore Dutt*[1]:—

[1] I. L. R. 9 Cal. 802.

"Primâ facie, in the case of land covered by water, the water belongs to the person to whom the land belongs; cujus est solum ejus est usque ad coelum. The owner of land is entitled, primâ facie, to everything either over or under it; and the ordinary, if not the very best, means of proving the ownership of land covered by water is to show that rights of fishing have been exercised in and over the water. There are few other means of proving ownership over such land, except perhaps by working minerals or carrying on other works below the surface of the soil."

Period from which limitation begins to run in a suit to recover possession of an alluvial increment.—An alluvial formation, unless covered with sand, is susceptible of possession in the same way as any other land. It is capable of actual enjoyment in one or more of the customary modes, such as by residence or tillage, or grazing cattle, or cutting reed or brushwood, or receipt of a settled rent. It is, in the majority of cases, capable of occupation or appropriation for some useful purpose soon after its formation. When, therefore, a suit is brought to recover possession of an alluvial increment, limitation may be effectually set up, unless it is brought within twelve years from the date of the formation of the accretion,[1] even though it may not be capable of cultivation until some time after. A suit for recovery of possession of an island separated from a riparian estate by a fordable channel, falls within the purview of the same rule and is equally governed by it.

Enumeration of the several forms in which a suit to recover possession of a reformation on original site may arise.—But questions of considerable nicety and of no less difficulty too, sometimes arise in applying the law of limitation to a suit for recovery of possession of land reformed on its original site. Such a suit not unfrequently presents a varying combination of circumstances, which is again rendered more complex by the fact that diluviation and reformation are not sudden, but slow and gradual, events.

(*a.*) The simplest case is, where the owner of an estate continues in possession of it down to the date of its diluviation, and the land after submergence for any period, however long, subsequently reforms within 12 years next before the date of the suit instituted for the purpose of recovering possession of such land on the ground of reformation.

[1] *Luchmee Narain Sha* v. *Jutadharee Haldar*, 7 Suth. W. R. 89, on review sub. nom. *Doyamoyee Dasi* v. *Luckhee Narain Sha*, 7 Suth. W. R. 457; *Luchmee Debia Chowdhrain* v. *The Collector of Mymensing*, 7 Suth. W. R. 231; *Mahomed Ibrahim* v *Morrison*, I. L. R. 5 Cal. 39.

(*b.*) The case just supposed assumes a somewhat different aspect, if the owner of the estate is unable to prove, either that the land reformed within twelve years prior to the suit, or that after reformation he had been in possession up to a period within 12 years of the suit.

(*c.*) The third case which may be conceived, is, where the owner of an estate is dispossessed by a trespasser, say, a year before its diluviation, which continues to work for more than 11 years, and then, when the land reforms, it is again taken possession of by the same trespasser.

(*d.*) A fourth case similar to the last one is, where the owner of an estate remains in possession down to the date of its diluviation, but as soon as it reforms (no matter after what length of time) it is taken possession of by a trespasser, who continues in possession for a year or so, when it diluviates again and remains under water for upwards of 11 years. It reforms again, and then it is taken possession of by the same trespasser.

(*e.*) A fifth case arising out of the gradual character of the reformation may be supposed, where the reformation begins more than 12 years prior to suit, but is completed within 12 years of the suit.

Discussion of the law of limitation with regard to each of them.—Now in case (*a*), the proposition has been established by a series of decisions[1] that, where the owner of an estate remains in possession until it is washed away by diluvion, his possession is presumed to continue as long as the land continues submerged, however long the period of submergence may have been. That being so, the adverse possession of the trespasser, even assuming such possession to have commenced as soon as the reformation began, is ex hypothesi for a shorter period than 12 years, and consequently cannot defeat the title of the original owner.

The case (*b*) raises the question as to the incidence of the burden of proof, namely, whether on the one hand the real owner is bound to prove his possession even after reformation and down to a period within 12 years of his suit, or whether there is a presumption of the continuance of his possession down to such period; or whether, on the other hand, the trespasser is bound to show that he has been in adverse possession for more than 12 years.

[1] *Gokool Kristo Sen Moonshee* v. *David*, 23 Suth. W. R. 443; *Kally Churn Sahoo* v. *The Secretary of State for India*, I. L. R. 6 Cal. 725; *Mano Mohun Ghose* v. *Mathura Mohun Roy*, I. L. R. 7 Cal. 225; *Mahomed Ali Khan* v. *Khaja Abdul Gunny*, I. L. R. 9 Cal. 744; 12 Cal. L. R 257.

Mano Mohan Ghose v. Mothura Mohan Roy.—The case of *Mano Mohan Ghose* v. *Mothura Mohan Roy*,[1] decided by Wilson and Field, JJ., furnishes an answer to the case supposed under (*b*). Wilson, J., considered the matter both from the point of view of principle as well as from that of authority, and also laid down certain propositions of law applicable to the subject. His Lordship said:—"Certain propositions of law upon the subject are undoubted.

"It is not disputed that, as a general rule, where a plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years—*Maharaja Koowur* v. *Baboo Nund Loll Singh*.[2]

"Proof of possession within twelve years does not necessarily mean proof of acts of ownership within that time. The nature of the proof of possession must depend on the nature of the case. In the case of a house actually occupied, or land under cultivation, yielding a rent, proof of possession is easy. In many cases, as of lands incapable of cultivation, jungle or waste lands, unenclosed plots of various kinds, all the proof that can be commonly given is to show possession taken, or acts of ownership done, at some time, which possession will, in law, continue until the possessor by his conduct shows that he means to relinquish his possession, or he is excluded by some one else. These considerations, however, affect the mode of proof, not the burden of proof. The general rule still is, that the plaintiff must prove that he has been dispossessed within twelve years, see *Pandurang Govind* v. *Balkrishna Hari*."[3]

"But there are many cases in which the party on whom the burden of proof in the first instance lies, shifts the burden to the other side by proving facts giving rise to a presumption in his favour. We have to consider whether the present plaintiffs have succeeded in doing so, and for that purpose it is necessary to examine the decisions as to the burden of proof in the case of lands gradually diluviated and gradually reformed.

"As to such cases, a second proposition is, I think, beyond question, that when the diluviation has been more than twelve years before suit, the claimant, unless he can show possession since the reformation, must at least show that he was in possession down to the date of the diluviation.

"A third proposition is also, I think, beyond dispute, that where the

[1] I. L. R. 7 Cal. (225) 230; 8 Cal. L. R. 126.

[2] 8 Moo. Ind. App. (199) 220.

[3] 6 Bomb. H. C. 125.

true owner is in possession at the time of diluviation, his possession is presumed to continue as long as the land continues submerged: probably also afterwards until he is dispossessed.

"This, proposition, however, would not be sufficient to shift the burden of proof. It would leave it upon the plaintiff, but would enable him to prove his case either by showing the dispossession to have been in fact within twelve years, or that the submergence has continued down to within twelve years, so that his possession cannot have been interfered with more than twelve years ago.

"But then rises the question, whether we ought not to presume something further in favour of the plaintiffs, whether, when they have proved their possession down to the period of diluviation, and have shown the diluviation to have occurred at such a date and under such circumstances as in this case, we ought not to presume the submergence and with it the plaintiff's possession to have continued until the contrary is shown. If this presumption can properly be made, then the burden is shifted to the defendants of showing adverse possession for twelve years.

"Upon principle, I think, such a presumption may properly be made. The well-known presumption in favour of the continuance of a physical condition, in the ordinary course of things likely to continue, until the contrary is shown, is embodied in section 114 of the Evidence Act, which section is followed by illustrations and explanations."

His Lordship then, in order to fortify the conclusion which he had so deduced from principle, referred to the case of *Mohunt Chattoorbhooj Bharti* v. *The Government of India*,[1] decided by Garth, C. J., and Tottenham, J., another case (Reg. App. 280 of 1877) decided by Pontifex and Macdonell, JJ., the Privy Council case of *Radha Gobind Roy* v. *Inglis*[2], and the case of *Kally Churn Sahoo* v. *The Secretary of State*,[3] decided by Garth, C. J., and White and Maclean, J.J.

Mahomed Ali Khan v. **Khajah Abdul Gunny**.—The basis of this presumption as to the continuance of possession was discussed again in the Full Bench case of *Mahomed Ali Khan* v. *Khaja Abdul Gunny*,[4] where the suit was to recover possession of land which had previously

[1] Reg App. No. 185 of 1877, unreported.

[2] 7 Cal. L. R. 364.

[3] I. L. R. 6 Cal. 725.

[4] I. L. R. 9 Cal. 744. Cf. *The Secretary of State for India* v. *Vira Rayan*, I. L. R. 9 Mad. 175.

been jungle. The majority of the learned Judges re-affirmed the general rule that the plaintiff cannot, merely by proving possession, at any period prior to twelve years before suit, shift the onus to the defendant. But they said that possession is not necessarily the same thing as actual user; that the nature of the possession to be looked for, and the evidence of its continuance, must depend upon the character and the condition of the land in dispute; that where the land is either permanently or temporarily incapable of actual enjoyment in any of the customary modes, all that can be required is that, the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and that in such cases, when he had done this, his possession is presumed to continue as long as the state of the land remained unchanged, unless he is shown to have been dispossessed. Wilson, J., in delivering the judgment of the majority of the Court, observes :—" When lands, which have been in such a condition as to be incapable of enjoyment in the ordinary modes, are reclaimed and brought under cultivation, the change is in many instances gradual and difficult of observation while in progress. Diluviated land may take years to reform. Jungle land is often brought under cultivation furtively by squatters clearing a patch here and a patch there at irregular intervals of time. So that it may be a matter of extreme difficulty to prove as to any piece of land, the exact date at which its condition became altered. And as the plaintiff, who has complied with the conditions we had indicated, is in the absence of dispossession presumed to continue in possession as long as the state of the land remains unchanged, it is essential to enquire on whom the burden of proof of the date of the change lies.

"The true rule appears to us to be this: That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in section 114 of the Evidence Act."

And further down his Lordship said :—"The presumption of which we have spoken is in no sense a conclusive one. Its bearing upon each particular case must depend upon the circumstances of the case; and it is always liable to be rebutted by evidence."

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Garth, C. J., while agreeing with the majority of his colleagues, as to the result of the particular case before them, differed from their view of the law, holding that if the plaintiff proves possession at any period prior to twelve years before suit, such possession is presumed to continue until the contrary is shown; and that consequently the onus is shifted to the defendant to prove that he has been in adverse possession for twelve years; and that there can be no variation in the application of this presumption according to the particular kind or character of the land, *e. g.* cultivable land, jungle land or land covered by water.[1]

It may be observed by the way that though the rules laid down in the above judgment indicate that the same presumption in favour of the continuance of possession is to be applied in the case of jungle land as in the case of submerged land, there is, however, one material distinction between the two cases, namely, that in the latter, the presumption is based on prior actual possession, unless the land before submergence was also jungle; whereas in the former, there can be no prior actual possession at all, but only constructive possession by going upon the land, laying down boundary-marks or the like.

Where after reformation the land remains covered with sand or otherwise continues unfit for cultivation for some time, it has been held that the possession of the real owner proved to exist down to diluvion, is presumed to continue until dispossession takes place by the exercise of some positive acts of ownership.[2]

Kally Churn Sahoo v. The Secretary of State for India.—Cases (*c*) and (*d*) may be solved by the application of the same principle as that which has furnished an answer to case (*b*). But (*d*) is directly illustrated by the case of *Kally Churn Sahoo* v. *The Secretary of State for India.*[3] There certain lands alleged by the plaintiff to have originally been a parcel of his estate, reformed after submersion for some years. It was then taken possession of by Government as a reformation on the diluviated site of one of their island estates, and continued in their posses-

[1] Cf. *Trustee, &c. Agency Co.*, v. *Short*, 13 App. Cas. 793 (on appeal from New South Wales); *Clarke* v. *Elphinstone*, 6 App. Cas. 164 (on appeal from Ceylon).

[2] *Mohiny Mohun Das* v. *Krishno Kishore Dutt*, I. L. R. 9 Cal. 802; 12 Cal. L. R. 337.

[3] I. L. R. 6 Cal. 725 If ownership is claimed over a large tract of waste land with a defined boundary, acts of ownership exercised over portions of it constitute evidence of possession of the whole. *Clarke* v *Elphinstone*, 6 App. Cas. 164 (on appeal from Ceylon); *Sivasubramanya* v. *Secretary of State*, I. L. R. 9 Mad. (285) 305.

sion for four or five years. It diluviated again, and reformed for the second time after an interval of nearly seven years, when it was again taken possession of by Government. The plaintiff brought his suit to recover possession after the lapse of more than twelve years from the date of the first reformation, that is to say, the date when Government took possession of it. It was urged on behalf of the plaintiff that as Government was a mere wrong-doer, no presumption ought to be made in favour of the continuance of its possession, during the period that the land was under water. But this contention was expressly overruled, by Garth, C. J., and Maclean, J., while White, J., said:—"It appears to me unnecessary to determine whether Government, as a wrong-doer, when it first took possession, could be said to have constructive possession during the period of the second submersion. It is enough to say that the time began to run against the plaintiffs when Government first took adverse possession, and that, as the plaintiffs have not resumed or recovered possession before suit, it continued to run according to the ordinary law of computing the period of limitation, and this, irrespective of whether the land was or was not capable of occupation by reason of its submersion."

Anticipating the consequences of such a ruling, his Lordship proceeded to observe:—"The result of our decision will be that in similar cases to the present, owners of land, which have suffered from the successive diluviations and reformations, must, if they wish to preserve their rights, bring their suit within twelve years of the time when adverse possession is first taken of land reforming on the original site, whether at the time of suit the land is capable of occupation in consequence of a second diluviation. I have not in my experience known of a suit of this character being brought where the land in dispute at the time of suit had disappeared and formed part of the bed of a river; and I can foresee many difficulties in the way of such a suit, chiefly arising from the difficulty of identifying lands which are at the bottom of a river. But there is no doubt that such a suit would lie, and so long as land which is exposed to successive diluviations and reformations is subject to the ordinary law of limitation, it will be a matter of prudence to bring such a suit." It may be remarked that this decision carries the doctrine of adverse possession to the very verge of law.

As regards (*e*), there can be no doubt that so much land as reforms within twelve years of the suit that may be brought by the owner of the

original site to recover possession, must be held to belong to him.[1] But the result of this may in some cases possibly be, that the owner of the original site will, after the completion of the reformation, find interposed between his unsubmerged land and the recent reformation, a belt of ground consisting of older reformations to which a stranger has meanwhile acquired a title by prescription.

[1] See observations of Garth, C. J., in *Kally Churn Sahoo* v. *The Secretary of State for India*, I. L. R. 6 Cal., 725. In *Koomar Runjit Singh* v. *Schoene, Kilburn*, 4 Cal. L. R. 390, the owner of the original site lost his claim to recover possession of a portion of the land which had reformed within twelve years of his suit, because in that case it was not shown what portion of the land had reformed within twelve years, and what portion, beyond that period.

LECTURE X.

RIPARIAN RIGHTS.

Definitions of terms—Riparian rights, where generally exercised—Foundation of riparian rights—Effect of the division of riparian land on riparian rights—Characteristics of riparian rights—Enumeration of the ordinary kinds of riparian rights—Reasons for excluding rights of fishery and ferry from this enumeration—I. Right to accretion by alluvion.—II. Right of access to the river—Nature of the right—Reasons for the existence of the right—Discussion of authorities—*Lyon* v. *Fishmongers' Co.*—*North Shore Railway Co.* v. *Pion*—Right of landing and crossing the foreshore at low-water for the purpose of having access to land—Obstruction to the right of access, when actionable—Discussion of authorities—III. Right to erect wharves, piers and landing-places—Right to erect public wharves &c. not a riparian right—Nature of private wharves &c.—Questions to be considered in determining the legality or otherwise of such structures, as private wharves, piers or landing-places—Remedies when such structure is a purpresture or a nuisance or both—Extent of the right to build private wharves &c. under American law—Under Anglo-Indian law—Right of a riparian proprietor to moor vessels to his wharf—IV Right to the use, purity and flow of water—Vinnius' doctrine—Exposition of the nature of the right by Chancellor Kent—By Leach, V. C., in *Wright* v. *Howard*—Modes of disturbance of the right—True measure of the right—Reasonable user, how determined—(*a*) Right to the use of water—Distinction between 'ordinary' and 'extraordinary' uses of water—*Miner* v. *Gilmour*—'Ordinary uses,'—'Extraordinary uses'—*The Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*—Limits of 'extraordinary uses'—Diversion of water for irrigation—*Evans* v. *Merriweather*—Diversion of water for irrigation under Anglo-Indian law—Extent of the right—(*b*) Right to the purity of water—What kinds of pollution actionable—When pollution by discharge of sewage &c. becomes actionable—The Indian Easements Act, s. 7—Whether previous pollution any justification—(*c*) Right to the flow of water—*Robinson* v. *Lord Byron*—*Bickett v. Morris*—*Kali Kissen Tagore* v. *Jodoo Lal Mullick*—Overflowing land above or below.

The law of alluvion, in the branch of it, which relates to the acquisition of land by right of accession, dealt with at length in some of the previous lectures, forms a special subdivision of the wider and more comprehensive department of law, which is conversant with the ascertainment, definition and adjustment of Riparian Rights in general. To an examination of the foundation of these rights, and an exposition of some of the fundamental principles which underlie and govern the remainin kinds of them, I shall now invite your attention.

Definitions of terms.—The term 'riparian' is derived from the Latin word 'ripa', which signifies a bank of a river or stream in general, and includes the bank of an artificial stream. Hence the expression 'riparian

land' means land, which is on the bank of, or, to use perhaps a more accurate phrase, which abuts on a stream, either natural or artificial. A 'riparian proprietor' is the proprietor of riparian land; but the phrase, 'riparian rights' denotes exclusively that group of *natural rights*, which reside in a riparian proprietor, or are incident and inseparably annexed to his ownership of riparian land, abutting on a natural stream only; as distinguished from easements or acquired rights (derived by grant, covenant, prescription or statute) which a riparian proprietor may have in a stream, either natural or artificial.[1]

Littoral rights are rights (natural or acquired) belonging to the owner of land adjoining the foreshore of the sea, or of a tidal navigable river. There appears to be no corresponding expression applying exclusively to such natural rights as attach to land adjoining a non-tidal river or stream; the expression 'riparian rights' being large enough to embrace all natural rights annexed to lands which border on a river through the whole length of its course, both below and above the tide.

Where riparian rights are generally exercised.—The ordinary forms of riparian rights, such as the diversion or abstraction of water from a stream for the purposes of irrigation, manufacture, or the propulsion of machinery, are, in fact, chiefly on account of the unsuitability of salt-water for such purposes, exercised generally in those parts of rivers that are above the tide; and even in those cases where water is used for such purposes in the tidal or navigable parts of a river, the supply of it is practically so unlimited, that no diminution of the volume of water, or the alteration of the flow of the stream, results from the ordinary modes of user, such as would create any occasion for litigation among the neighbouring or opposite riparian proprietors. Hence controversies relating to riparian rights are usually confined to the non-tidal or non-navigable parts of rivers or streams; in either of which cases, as I have pointed out before,[2] the ownership of the soil of the stream generally accompanies the ownership of the adjacent bank.

Foundation of riparian rights.—Whether this concomitance is merely accidental or whether the ownership of the bank constitutes an essential and exclusive basis for the existence of such riparian rights, formed the subject of very learned and elaborate arguments before the Judicial Committee of the Privy Council in the case of *Lord* v. *The Commissioners*

[1] Goddard on Easements (3rd ed.), 71-72; Monahan's Method of Law, (Apdx.) sec. 16, second para.

[2] *Supra*, 92-93 (non-tidal), 113-115 (non-navigable).

for the city of Sydney,[1] on appeal from New South Wales, the Supreme Court of that colony having held that such rights could not exist without the ownership of the soil under the water. But the Privy Council having come to the conclusion, upon a construction of the Crown grant, under which the riparian proprietor in that case had obtained his land, that it also passed the ownership of the adjoining creek (a non-navigable fresh-water stream in that case) ad medium filum aquae, considered it unnecessary to express any definite opinion on that question. They said:—"Their Lordships do not think it necessary to express any opinion on the first step in this argument. They desire only that it may not be taken for granted that they accede to it. It is a question of some nicety, and it so constantly happens that the owner of the bank is also the owner of the land ad medium filum, that it is dangerous to attribute too much importance to the language either of judicial decisions or text books, which seem to define the right, where the foundation of it has not come specifically in question."[2]

The question, however, was directly raised in *Lyon* v. *Fishmongers' Company*,[3] before the House of Lords, where Lord Selborne thus expounded the nature of the foundation of these rights:—

"With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so called, because the word 'riparian' is relative to the bank, and not the bed, of the stream; and the connection, when it exists, of property on the bank with property in the bed of the stream depends, not upon nature, but on grant or presumption of law. In some tidal navigable rivers (as the *Severn*), parts of the bed of the tidal stream belong to riparian owners; and it appears from Mr. Angell's book (often quoted in our Courts) that in Pennsylvania and Alabama, states whose jurisprudence is founded generally on English law, the whole property in the beds of large non-tidal navi-

[1] 12 Moo. P. C. C. 473.

[2] Even Story, J., in his celebrated judgment in *Tyler* v. *Wilkinson*, (4 Mason, U. S. R., 397) used expressions which clearly go to show that, in his opinion, the ownership of the subjacent soil formed an essential condition for the existence of riparian rights; for he said: "Prima facie, every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank, to the middle thread of the stream; or, as it is commonly expressed, ad medium filum aquae. *In virtue of this ownership* he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction." The italics do not occur in the judgment.

[3] 1 App. Cas., 662. Cf. *North Shore Railway Co.* v. *Pion*, 14 App. Cas., 612; *Attorney-General of the Straits Settlement* v. *Wemyss*, 13 App. Cas., 192.

gable rivers is in the State. The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriately by every one having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good, iure naturae, as vertical; and not only the word 'riparian' but the best authorities, such as *Miner* v. *Gilmour*[1] and the passage which one of your Lordships has read from Lord Wensleydale's judgment in *Chasemore* v. *Richards*,[2] state the doctrine in terms which points to lateral contact rather than vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low-water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right."

Lord Cairns, L. C., observed in the same case;—"I cannot admit that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream."

If then the lateral contact of land with the flow of the stream (whether such contact be constant or intermittent—constant in the case of non-tidal rivers and streams, and intermittent in the case of tidal rivers) is the true foundation of the natural riparian rights, it follows as a necessary consequence that the rights of a riparian proprietor in a tidal navigable river must be precisely the same as those of a riparian proprietor in a non-tidal stream, though of course in the former case such rights are subordinate to, and are controlled by, the public right of navigation. In the same case Lord Selborne, after citing some authorities, said:—

"Upon principle, as well as upon those authorities, I am of opinion that private riparian rights may, and do, exist in a tidal navigable river." "The rights of a riparian proprietor, so far as they relate to any natural stream, exist iure naturae, because his land has, by nature the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognise and follow the course of nature in every part of the same stream. Water which is more or less salt by reason of the flow of the tides may still be useful for many domestic and other purposes,

[1] 12 Moo. P. C. C. 131.

[2] 7 H. L. C. 349; 29 L. J. Ex. 81; 5 Jur. N. S. 873.

though there are no doubt some purposes which fresh water only will serve."

The reasoning underlying these observations, though they do not relate directly to the case of non-tidal rivers, equally supports the position that the riparian rights must be exactly the same, whether the land borders on a navigable river or on a non-navigable stream, subject of course in the former case to the qualification already stated, namely, that the public right of navigation must not be obstructed or interfered with.

Effect of the division of riparian land on riparian rights.—A further corollary deducible from such a basis of riparian rights is that, if a riparian proprietor carves distinct parcels out of his riparian estate, however numerous such parcels may be, yet so that each one of them abuts on the stream, and grants them to different individuals, the grantee of each one of those parcels will become a riparian proprietor and be clothed, eo instanter, with all the natural riparian rights.[1] "If" says Shaw, C. J., "the owner of a large tract, through which a watercourse passes, should sell parcels above and below his own land retained, each grantee would take his parcel with a full right, without special words, to the use of the water flowing on his own land, as parcel, and subject to the right of all other riparian proprietors to have the water flow to and from such parcel. There is no occasion, therefore, for the grantor, in such case to convey the right of water to the grantee, or reserve the right of water to himself, in express words, because, being inseparable from the land, and parcel of the estate, such right passes with that which is conveyed and remains with that which is retained."[2]

But, if on the other hand, he grants his riparian estate to another, reserving to himself a belt or strip of land stretching along the whole length of the river frontage, the grantee does not become entitled to any of the riparian rights, but the grantor still continues to have all such rights in himself.[3]

Characteristics of riparian rights.—These rights are natural rights inherent in the riparian soil, whether the owner of such soil exercises them or not, and he may begin to exercise them whenever he will.[4] Use does

[1] Goddard on Easements (3rd ed.), 353.

[2] *Cary* v. *Daniels*, 8 Met., (466) 480, cited in Angell on Watercourses (7th ed.) § 92, and Gould on Waters, § 204.

[3] Goddard on Easements (3rd ed.), 76; *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300.

[4] *Sampson* v. *Hoddinott*, 1 C. B. (N. S.) 590.

not create them nor does disuse destroy or suspend them. Unity of possession or ownership of the lands above or below on the same stream does not extinguish or destroy them.[1]

Enumeration of riparian rights.—The ordinary species of riparian rights are the following:—

1. Right to accretions by alluvion.
2. Right of access to the river.
3. Right to erect wharves, piers, landing or bathing-places, or other similar structures.
4. Right to the use, purity and flow of water.
5. Right to erect defences against the encroachments or the flood of the river.

Reasons for excluding rights of fishery and ferry from this enumeration.—It is needless to point out that neither the right of fishery nor that of ferry comes under the denomination of riparian rights. For, in those rivers, where the ownership of the bed is vested in the sovereign, the right of fishery belongs to every member of the public, whether he be a riparian proprietor or not; and in those rivers where the ownership of the bed resides in the riparian proprietors, the right arises, as I shall explain hereafter,[2] by virtue of the ownership of the subjacent soil, and not of the adjacent bank.

The right of ferry also, is not a riparian right, because although every riparian owner may ply a ferry for the use of himself, his family and his servants, he cannot set up one for the use of the public, and levy tolls from them (which, in truth, is the essence of the right) without prescription, charter or grant from the sovereign.[3]

I. Right to accretions by alluvion.

This right arises ex iure naturae, wherever land abuts on a river, whether the bed of the river be the property of the riparian owners as in the case of private rivers, or the property of the Crown as in the case of public rivers. It is clear, therefore, that this right is incident to the ownership of land on the bank, and does not depend for its accrual

[1] *Sury* v. *Pigot*, Popham's R. 166; *Wood* v. *Waud*, Ex. 748; 18 L. J. Ex. 305; *Johnson* v. *Jordan*, 2 Met., 239; and the cases cited in note 4 to § 92 of Angell on Watercourses, (7th ed.).

[2] Lect. XIII, *infra*.

[3] Hale de Iure Maris, p. I. c. 2; Hargrave's Law Tracts, 6, 7; Morris' Hist. of the Foreshore, 372; 2 Black. Comm. 37; 2 Inst. 220; *Yrotter* v. *Harris*, 2 Y. & J., 285; *R.* v. *Marsden*, 3 Burr., 1812.

on the ownership of the adjoining soil under the water. Whatever room there might possibly be for any divergence of opinion as regards the riparian right to the flow of water in a natural stream, as to which, however, I shall have occasion to say in the next lecture, there can be none whatever as regards this right, that it cannot be so disannexed from riparian land as to prevent its passing with such land in favour of a purchaser; although, no doubt, in the case of leases and mortgages, which are not absolute transfers of the proprietary interest, such right may be reserved in the lessor or mortgagor by express contract between the parties.

II. Right of access to the river.—Nature of the right.

Every riparian proprietor has a right of access to the river from his land, for every kind of use of which it may be susceptible, just as every owner of land abutting on a public highway has a right of access from his land to the highway. Whether this right of access is a private right, belonging to the owner of riparian land or merely a part of the right of navigation which he enjoys in common with the rest of the members of the public, has been the subject of much debate and diversity of opinion. But it may now be taken as fully established that it is a private right, for the infringement whereof an action will lie; and this not because the riparian owner has been injured as to the public right and has sustained particular damage, but because his private right has been interfered with.

Reasons for the existence of the right.—Deprivation of the frontage of roadside or riparian properties by the placing of obstructions between the highway (over land or water) and such properties amount to the infliction of a serious loss on the owner, not merely because he is thereby incommoded, but also because such obstructions have the undoubted effect of permanently deteriorating the value of his property, in the majority of instances, to a very considerable degree. This consideration alone, it is conceived, is amply sufficient to demonstrate the existence of a private right of access in the riparian owner, distinct and separate from his right to use the highway as one of the members of the public.

Discussion of authorities.—The question arose in *Rose* v. *Groves*,[1] where a riparian owner having a public house on the Thames complained that his access to the river and the access of his customers to his house was obstructed by timbers and spars placed in the river by the defendants, which drifted at high-water up to and along his land; and it was there

[1] 3 Man. & Gr. 630.

held that the obstruction was an infringement of a private right. The point arose again in *Attorney-General* v. *The Conservator of the Thames*,[1] where Lord Hatherley (then Vice-Chancellor) distinctly recognised the right of access as a private right, although the action was dismissed by him on the ground that the obstruction complained of by the wharfinger was not a direct interference with the access to his wharf; but was, if any obstruction at all, an obstruction to the general navigation of the river. "Independently of the authorities," said his Lordship, "it appears to me quite clear, that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private, as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right."

Lyon v. Fishmongers' Co.—But the leading case upon this point is *Lyon* v. *Fishmongers' Co.*[2] The plaintiff in that case had a wharf on the river Thames, the south side abutting on the main channel of the river, and the west side on a tidal creek. The plaintiff had access to the water for the purpose of loading and unloading goods on both the south and the west, and was accustomed to use both. In 1857 the Thames Conservancy Act enabled the Conservators of the Thames, to grant to owners and occupiers of land fronting the Thames, a right to make quays, embankments, &c., in front of their land on payment of a fair consideration. The defendants who owned a wharf at the end of this creek, obtained in 1872 the sanction of the Conservators, to make an embankment in front of their wharf for the purpose of bringing their wharf up to the main channel of the river, which would have the effect of wholly displacing the water from the creek and of depriving the plaintiffs altogether of their access to the river from the west side of their wharf. The Act contained a saving of the rights

[2] 1 H. & M. 1.

[1] 1 App. Cas., 662; *North Shore Railway Co.* v. *Pion*, 14 App. Cas., 612; *Attorney-General of the Straits Settlements* v. *Wemyss*, 13 App. Cas., 192. Cf. *Beckett* v. *Midland Railway Co.*, L. R. 3 C. P. 82; *Metropolitan Board of Works* v. *M'Carthy*, L. R. 7 H. L. 243; *Bell* v. *Corporation of Quebec*, 5 App. Cas., 84; *Brown* v. *Gugy*, 2 Moo. P. C. C. (N. S.) 341. See *Frits* v. *Hobson*, 14 Ch. D. 542; *Caledonian Railway Co.* v. *Walker's Trustees*, 7 App. Cas., 259 (as to right of access to and from a highway over land).

of owners of lands on the banks of the river. The plaintiff filed a bill to restrain the defendants from proceeding with the execution of those works and thereby obstructing his right of access. The contention on behalf of the defendants was two-fold: first:—That a riparian proprietor on the bank of a tidal navigable river has no rights similar to those which belong to a riparian proprietor on the bank of a natural stream above the flow of the tide; secondly: That a riparian proprietor, whose frontage and means of access to such a tidal river is cut off by an encroachment from the adjoining land on the stream, suffers no loss or abridgment of any private right belonging to him as such riparian proprietor, but is only damnified in common with the rest of the public. Malins, V. C. granted the injunction prayed for, holding that the plaintiff had a private right of access which would be interfered with by the proposed works. The Lord Justices, however, overruled his decision, but on appeal by the plaintiff to the House of Lords, it reversed the decision of the Lords Justices and upheld that of the Vice-Chancellor.

I have already read to you the observations of Lord Selborne with regard to the first contention, in which his Lordship shows very clearly that there can be no reasonable ground for the distinction which was sought to be drawn between tidal and non-tidal rivers as regards the nature of riparian rights. As regards the second contention, Lord Cairns, L. C., said:—"The Lords Justices held that it must be taken to be established, and it was not disputed at your Lordships' bar, that the appellant had in respect of the west side of Lyon's wharf, at the time when the Conservancy Act passed, the ordinary rights of the owner of a wharf on the banks of a navigable river, The question is, what are those rights, and are they preserved intact by the 179th section?"

"Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him quà owner or occupier of any lands on the bank, nor is it a right which, per se, he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction."

North Shore Railway Co. v. Pion.—The law declared in the foregoing case was expressly followed by the Privy Council in *North Shore Railway Co.* v. *Pion and others*,[1] on appeal from the Supreme Court of Lower Canada. The plaintiffs, respondents, were owners of land abutting on a tidal navigable river. Upon that land stood a manufactory for leather dressing and dyeing, and, on the river frontage of it a quay, used by them for the landing of wood and coal, and for washing of hides. The appellants constructed a railway upon the foreshore of the river by means of an embankment extending along the entire length of the frontage of the respondents' land, thereby cutting off all access to the water from such land, except at two openings (one left in the embankment opposite that land, and the other just outside its boundary), through which the river was accessible at certain high tides. It was contended on behalf of the appellants that, whatever the law might be in England with regard to the right of a riparian proprietor on the banks of a tidal navigable river to have access to the water from his land, no such right existed under the old French law, which prevailed in Lower Canada. But the Privy Council held that the law expressed in *Lyon* v. *Fishmongers' Co.*[2] was not based upon English authorities alone, but on grounds of reason and principle, and was therefore applicable to every country in which the same general law of riparian rights prevailed, unless excluded by some positive rule or binding authority of the lex loci.

Right of landing and crossing the foreshore at low-water for having access to land.—As an incident necessarily involved in this right of access to and from water, is the right which every riparian proprietor has of landing and crossing the foreshore at low-water for that purpose, even when such foreshore is private property. It has been argued that if navigation be, as it really is, the principal purpose for which this right of access is accorded to a riparian proprietor by law, then as the public right of navigation exists at all times and states of the tide,[3] and is paramount to all private rights of property in the bed of the river or in the foreshore, which too is a part of the bed,[4] it follows that the right of the Crown, or of its grantee, to the foreshore must be subservient to this right of access. But it is apprehended that it is unnecessary to have recourse to this reasoning as the

[1] 14 App. Cas. 612. [2] 1 App. Cas. 662.

[3] *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339; 15 L. J. Q. B. 59.

[4] Cf. *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192.

conclusion which these premises legitimately warrant would restrict this right of crossing the foreshore at ebb tide to those cases alone where the exercise of it is necessary for navigation only and not for other purposes. Be this, however, as it may, this right to land and cross the foreshore at low-water even when it is private property, may now be rested upon the decision of the Privy Council in *Attorney-General of the Straits Settlement* v. *Wemyss*,[1] where compensation was awarded to a riparian (or rather littoral) proprietor for the obstruction of his right of access to the sea caused by a grantee of the foreshore from the Crown, in the execution of certain reclamation and other works thereupon. There is no distinction in law between the foreshore of the sea and the foreshore of a tidal navigable river, and private proprietary right therein is just as much subject to the right of the adjoining littoral owner in the one case as it is in the other.

Obstruction to the right of access, when actionable.—Having thus established the position that every riparian or littoral proprietor (whether upon a tidal or navigable or upon a non-navigable river) possesses a right of access to and from the river, as an incident inseparably annexed to his land, the next thing we have to enquire is, what obstruction will amount to an interference with this right, so as to become actionable, or to be a proper ground for an injunction. This indeed is so eminently a question of fact, and the circumstances of each case may be so diverse, that it is almost impossible to lay down comprehensive rules on the subject; nor are the authorities relating to this matter so clear and consistent as to enable us to deduce general principles from them. One proposition, however, is quite clear that if the direct and immediate access of the riparian (or littoral) proprietor to and from the waterway is interfered with, (as in *Lyon* v. *Fishmongers' Co.*,[2] *Attorney-General of the Straits Settlement* v. *Wemyss*,[3] and *North Shore Railway Co.* v. *Pion*[4]) by the erection of an obstruction directly between the waterway and the riparian frontage, such obstruction will give a right of action.

Discussion of authorities.—This proposition, however, has received some extension, and there are cases (though they do not all bear upon the question of unauthorized interference with the riparian right of

[1] 13 App. Cas., 192. *Cf. North Shore Railway Co.* v. *Pion*, 14 App. Cas. 612; *Marshall* v. *Ulleswater Co.*, L. R. 7 Q. B. 166. This right has been recognized in America by a great number of cases, they are collected in note 1 on p. 732 of Angell on Watercourses (7th ed.)

[2] 1 App. Cas. 662. [3] 13 App. Cas. 192. [4] 14 App. Cas. 612.

access to water) in which obstructions not erected immediately ex adverso of the riparian property have been also declared to be actionable. In *Beckett* v. *Midland Railway Co.*,[1] the defendants, a railway company, erected an embankment on a portion of the public road, opposite the plaintiff's house, thereby narrowing the road from fifty to thirty-three feet. The effect of this, as proved in evidence, was to materially diminish the value of the house for selling or letting, and to obstruct the access of light and air to it. The Court of Common Pleas held that this was such a permanent injury to the estate of the plaintiff in the house as would entitle him to an action for damages, if the works executed by the railway company had been done without statutory sanction, and that it therefore gave him a right to compensation under the Lands Clauses Consolidation Act, and Railway Clauses Consolidation Act, 1845.

Somewhat analogous to this is the case of the *Metropolitan Board of Works* v. *M'Carthy*,[2] in which the facts were, that the plaintiff, respondent, was the lessee or occupier of a house in close proximity to a drawdock which opened into the Thames. He was not strictly a riparian proprietor, because a public road twenty-feet wide, intervened between his premises and the dock; still the premises being in close proximity to the latter, his use of it for the purposes of his business was very constant. This dock was wholly stopped up, and destroyed by an embankment constructed by the defendants, appellants; in consequence of which, plaintiff's access to and from the Thames was obstructed, and the value of the house became permanently diminished in value. The House of Lords held that the plaintiff was entitled to compensation.

Similarly, in *Caledonian Railway Co.* v. *Walker's Trustees*,[3] the respondents, trustees, were possessed of business premises situated at a distance of ninety yards from a main thoroughfare on the east, but connected therewith by means of two parallel approaches, one from the north and the other from the south side of the premises. The appellant, railway company, by means of operations, which they carried on on the main thoroughfare, entirely cut off the access to it from the north of the premises, and substituted for it a deviated road over a bridge with steep gradients,and diverted the other access, thus making it less convenient to the respondents. It was proved in evidence that these obstructions

[1] L. R. 3 C. P. 82.

[2] 7 App. Cas, 259.

[3] L. R. 7 H. L. 243.

caused substantial damage by depreciating the value of the premises. The House of Lords, upon these facts, held that the respondents' right of access to the main thoroughfare was proximate, and not remote or indefinite, and that, such right having been obstructed, they were entitled to recover compensation.

On the other hand, in *Bell* v. *Corporation of Quebec*,[1] before the Privy Council, on appeal from the Supreme Court of Lower Canada, the obstruction was held not to amount to an interference with the right of access to a navigable river. There, a bridge having been constructed by the Corporation of Quebec across a tidal navigable river at a little distance below the farm of the plaintiff, situated on the bank of the same river, the plaintiff brought an action for damages, and for the demolition of the bridge on the ground that the bridge obstructed the navigation of the river, and thereby caused damage to him as the owner of riparian land. But he failed to prove that the farm had been depreciated in value by reason of the bridge complained of, or that he had sustained damage from actual interruption of traffic. The Privy Council held that the plaintiff's right of access to the farm had not been interfered with, and that supposing that the bridge had caused some obstruction to navigation, the action was not maintainable as there was no proof of actual and particular damage.

III. Right to erect wharves, piers, landing-places or other similar structures.—Right to erect wharves, piers &c. not a riparian right.—Wharves, piers and landing-places may be either public or private.[2] Public wharves, &c., are those to which the public have a right to resort to moor their vessels, to load and unload their goods, and to receive and discharge passengers, on payment of a reasonable toll.[3] In England, they cannot be erected by private individuals without an Act of Parliament, or a grant or license from the Crown,[4] and in America,

[1] 5 App. Cas. 84. Cf. *The Mayor of Montreal* v. *Drummond*, 1 App. Cas., 834.

[2] Hale de Portibus Maris, c. 6; Hargrave's Law Tracts, 77; *Dutton* v. *Strong*, 1 Black, 1—32; *Baltimore Wharf Case*, 3 Bland Ch. R., 383, both cited in Houck on Navigable Rivers, §§ 280—281; Gould on Waters, § 119.

[3] *Ibid.* It has been held that even reasonable tolls cannot be charged at public wharves, unless there be consideration to support the claim, and an obligation is imposed by the grant or by the statute creating such wharves to keep them in repair. *Foreman* v. *Free Fishers of Whitstable*, L. R., 4 H. L., 266; Houck on Navigable Rivers, § 286; Gould on Waters, § 120.

[4] Hale de Portibus Maris, c. 6; Hargrave's Law Tracts, 77; 2 Stephen's Blackstone (7th Ed.) 449; Chitty on Prerogative, 195; *Foreman* v. *Free Fishers of Whitstable*, L. R., 4 H. L., 266; Coulson & Forbes' Law of Waters, 43, 50.

without the sanction of the state (conferred by an act of the legislature);[1] nor can any tolls be demanded in respect of them from the public without a statute or grant, licence or sanction.[2] The right of a subject to construct public wharves, &c., being, therefore, in the nature of a franchise, dependent for its origin on the pleasure of the Crown or the assent of the sovereign authority, and not incident to the ownership of riparian land, cannot be regarded as a riparian right. A discussion as to the nature and incidents of public wharves, &c., therefore falls outside the scope of this lecture.

Nature of private wharves &c.—We are concerned now only with what are called private wharves, piers and landing-places. These may be erected (either within or without the limits of a public port)[3] by a riparian proprietor, either for his own use or for the use of others, and for the landing, and storage, if necessary, of all kinds of goods,[4] except those that are chargeable with any duty.[5] Where the use of such private wharves, &c., is thrown open to others, the owner has a right 'to make particular agreements with every one that comes there by his consent to land his goods',[6] but he has no right to take a general toll, for this can only be done by virtue of an Act of Parliament, an express grant from the Crown, or immemorial prescription, presupposing such a grant.[7]

Questions to be considered in determining the legality of such structures as private wharves, &c.—Every riparian proprietor unquestionably has a right to build any structure that he chooses on his own land, so long as he does not exceed the bounds of his property, or interfere with the rights of the adjoining riparian proprietors, or with the

[1] Houck on Navigable Rivers, §§ 282—283; Gould on Waters, § 120.

[2] Chitty on Prerogative, 195; Woolrych on Waters (2nd ed.), 303—304; Houck on Navigable Rivers, § 286; Gould on Waters, § 120.

[3] Hale de Portibus Maris, c. 6; Hargrave's Law Tracts, 77; Houck on Navigable Rivers, § 281.

[4] Hale de Portibus Maris, c. 6; Hargrave's Law Tracts, 77; Houck on Navigable Rivers, §§ 280—281. It has been held in America that if a vessel is wrongfully moored to a private wharf, and the owner of the wharf sets it adrift, he incurs no liability, if in consequence of his act, the vessel is stranded and lost. *Dutton* v. *Strong*, 1 Black, 23, 32; cited in Houck on Navigable Rivers, § 280.

[5] *Ibid.*

[6] *Ibid.*

[7] Hale de Portibus Maris, c. 6; Hargrave's Law Tracts, 77; Chitty on Prerogative, 195; Houck on Navigable Rivers, § 286; Gould on Waters, § 120.

public right of navigation. But the purposes for which a wharf, pier, or landing-place is generally built, require that it shall extend into the water to a navigable depth; and when that is done, two questions arise in determining the legality of the structure. *First:*—Whether or not it is an encroachment on the public domain, or the property of the Crown; *secondly:*—Whether or not it is a public nuisance, as interfering with the public rights of navigation and fishery.

The solution of the first question manifestly depends upon the nature of the ownership of the soil of the bed of a river, and the situation of the boundary line which separates the bed from the bank. This, as I have already explained at some length in some of the previous lectures,[1] varies under different systems of law, according as the river is tidal and navigable, or simply navigable or non-navigable. For our present purpose, it is sufficient to assume the general conclusion there arrived at, namely, that the ownership of the bed of a river may be either in the Crown or in the riparian proprietors, according to the character of the river in each individual case. If these structures extend into the water in those rivers or parts of rivers where the ownership of the bed is in the riparian proprietors, they are certainly not encroachments, but they may (though not necessarily) constitute a public nuisance, if such rivers or parts of rivers are open to the public for navigation.[2] But, if such structures extend into the water in those rivers or parts of rivers where the ownership of the bed is in the Crown, they are doubtless encroachments on the public domain, and they may at the same time, though not ipso facto, constitute a public nuisance.

According to English law, a riparian proprietor, in the absence of a grant from the Crown or of prescription, has no right to extend wharves, piers or landing-places beyond the ordinary high-water mark of tidal navigable rivers.[3] "Indeed," says Lord Hale, "where the soil is the king's, the building below the high-water mark is a purpresture, an encroachment and intrusion upon the king's soil, which he may either demolish or seize, or arrent at his pleasure; but is not ipso facto a common nuisance, unless it be a damage to the port and navigation."[4]

[1] Lects. III & IV.

[2] *Orr Ewing* v. *Colquhoun*, 2 App. Cas., 839.

[3] Hale de Portibus Maris, p. 2, c. 7; Hargrave's Law Tracts, 85; 2 Co. Inst., 38, 272; *Attorney-General* v. *Richards*, 2 Anstr., 603; *Attorney-General* v. *Johnson*, 2 Wils., 101; *Attorney-General* v. *Terry*, L. R., 9 Ch., 423; *Attorney-General* v. *Earl of Lonsdale*, L. R., 7 Eq., 377.

[4] Hale de Portibus Maris, p. 2, c. 7; Hargrave's Law Tracts, 85.

Remedies when such structure is a purpresture or nuisance or both.—An encroachment upon the public domain is, in the phraseology of English law, called a purpresture, and the remedy for the Crown used to be either by an information of intrusion at the Common law, or by an information at the suit of the Attorney-General in equity, and now it is by an action simply in the nature of these old informations. In the case of a judgment upon an information of intrusion, the erection complained of, whether it be a nuisance or not, is abated. But, upon a decree in equity, if it appear to be a mere purpresture, without being at the same time a nuisance, the Court may direct an enquiry to be made, whether it is most beneficial to the Crown to abate the purpresture, or to suffer the erection to remain and have the produce and rents arising from it accounted for as part of the royal revenue. But, if the purpresture be also a public nuisance, this cannot be done; for, according to the Common law, the Crown cannot sanction a public nuisance,[1] though, an Act of Parliament might clearly render it lawful.[2]

In England, the land between high and low-water mark often belongs to private individuals, under special grants from the Crown. Hence the question whether a wharf or a pier is an encroachment or not, seldom occurs there in practice.[3]

Extent of the right to build private wharves &c. under the American law.—In most of the states in America (except New York) the strict rule, that every encroachment is a purpresture and therefore abatable, as such, does not prevail, and riparian proprietors are allowed to enjoy the rights and privileges in the soil beyond the line of their respective boundary, so far as may be consistent with, and so much as remains after, the full enjoyment of the paramount rights of the public. But, if a structure amounts to a public nuisance, the law is the same in both countries.[4]

The land between high and low-water mark has in America been given to, or adjudged to be in, the riparian proprietors, in some states.

[1] Hale de Portibus Maris, p. 2, c. 7; Hargrave's Law Tracts, 85; 2 Co. Inst., 38, 272; Co. Litt., 277b; 2 Story's Eq. Jur., § 922; Houck on Navigable Rivers, § 306; Gould on Waters, § 21; Eden on Injunctions, 222, 223; 2 Daniell, Ch. Pr. (4th Ed.), 1481; Hunt on Boundaries, (3rd Ed.), 39.

[2] See 8 & 9 Vict., c. 20, as to railway companies carrying their lines across navigable rivers, and diverting the course of private rivers. See also 26 & 27 Vict., c. 92, ss. 16—19.

[3] Houck on Navigable Rivers, § 307.

[4] Houck on Navigable Rivers, §§ 279—308; Gould on Waters, §§ 168—178, and the cases cited therein.

Thus, in Massachusetts, by ordinance of 1641 the owner of the adjoining land holds down to low-water mark, and it has been held under that ordinance that this low-water mark is not the line of ordinary low tide, but that of the lowest ebb to which it is often necessary to extend wharves, in order that they may be enjoyed to the best advantage.[1] In some other states (*e. g.*, Connecticut, New Jersey, Rhode Island, California, Florida, and Virginia, but not New York) even where the foreshore is not vested in the riparian proprietors, they are allowed to project their wharves with or without license from the state, beyond the high-water mark, if they do not interfere with the public rights of navigation, and the riparian proprietors conform to such regulations as the legislature may impose.

Riparian proprietors upon navigable rivers above the tide, even in those states where the bed of such rivers is the property of the state, possess the right to construct in the shoal water in front of their land, wharves, piers and landing-places, if they are built so as not to obstruct navigation. The exercise of this right, however, may be regulated or prohibited by the state.[2]

Under Anglo-Indian law.—In India, apart from special and local Acts having reference to particular ports or harbours,[3] the only general provision of law which throws any light upon the question we are now discussing, is the first part of section 5 of Regulation XI of 1825, which enacts that:—"Nothing in this Regulation shall be construed to justify any encroachments by individuals on the beds or channels of navigable rivers, &c." The language of this section, which is somewhat peculiar, would seem to limit the rights of riparian proprietors, as regards encroachments on the beds of navigable rivers, to the same extent as that to which it is limited by English law, and to equally forbid riparian proprietors from overstepping the strict boundary line of their

[1] Gould on Waters, § 168.

If a wharf projects into navigable waters, so as to amount to an encroachment on the soil of the state, the wharf-owner is not entitled to recover compensation from any one, who merely uses that part of the wharf which is situated on such soil. Gould on Waters, § 120, and cases cited in note 2 on p. 217.

[2] Gould on Waters, § 179.

[3] See ss. 83—85 of Act III of 1890 (B C.), Calcutta Ports Act. Section 83 renders it unlawful for any person, save the Port Commissioners, to make, erect or fix below high-water mark within the port of Calcutta, any wharf, quay, stage, jetty, pier, erection or mooring, unless the assent of the Local Government shall have been first obtained.

property when they build wharves, piers or landing-places on the banks of navigable rivers. The construction of bathing-ghats on the banks of navigable rivers seems also to fall within the ambit of this prohibition. The innumerable landing-places and bathing-ghats that dot the banks of navigable rivers in India, many of which are in reality encroachments on the public domain,—constructed mostly by pious Hindus under the influence of their religion, which characterises such acts as highly meritorious,—is attributable rather to non-interference or forbearance on the part of Government, (dictated probably by a policy of religious toleration), than to the want of any power on its part to abate such encroachments. These landing-places or bathing-ghats are generally built on the banks of rivers where the channel is very broad, and being made either for the benefit of navigation or for other public use, are readily acquiesced in by Government.

Right of a riparian proprietor to moor vessels to his wharf.—A riparian proprietor has a right to moor a vessel of ordinary size alongside his wharf for the purposes of loading and unloading at reasonable times and for a reasonable time, even though such vessel may overlap the wharf or dock of an adjoining proprietor, provided the free and necessary access to the latter wharf, or the free entrance to, or exit from, the dock is not thereby obstructed.[1] He may even construct and moor to his bank a floating wharf and boathouse, provided it does not in any way obstruct the navigation of the river.[2] So long as a riparian proprietor does not fill up the water spaces in front of his land, or build out a wharf or pier, an adjoining riparian proprietor who has already built a wharf may also have access to the sides of his wharf; but as every riparian proprietor has equal right to make improvements on his own estate and also in front of it, he may build out a wharf at pleasure, even though the effect of it may be to prevent vessels from approaching the side of the wharf of his neighbour.[3]

IV Right to the use, purity and flow of water.—This too, since the exposition of the law in *Lyon* v. *Fishmongers' Co.*,[4] must be regarded as a riparian right, dependent for its accrual on the ownership of the bank, and not of the bed, of a river or stream, though the language of some

[1] *Original Hartlepool Colliery Co.* v. *Gibb*, 5 Ch. D. 713.

[2] *Booth* v. *Rattè*, 15 App. Cas., 188, (decided by the Privy Council, on appeal from Ontario).

[3] Gould on Waters, §§ 153—154, and the cases cited therein.

[4] 1 App Cas 662.

of the earlier decisions in which the nature of this right has been expounded, might probably have lent some countenance to the theory that the ownership of the bed was essential to the existence of the right.

Vinnius' doctrine.—The purposes for which, according to Roman law, flowing water might be used, and the community of right which the public enjoyed in it, have been thus stated by Vinnius in his commentaries on the Institutes:—Aqua profluens ad lavandum, et potandum unicuique iure naturali concessa.[1] They have been stated at another place, a little more fully, thus:—Aqua vero fluminis utimur ad lavandum, potandum, aquanda pecora: qui usus communis est iure naturali omnibus concessus.[2]

Exposition of the nature of the right by Chancellor Kent.—The governing principle upon this matter is so perspicuously stated by Chancellor Kent in his learned Commentaries,[3] that it may be useful to cite at length the following passages from them:—

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple use of it while it passes along. Aqua currit et debet currere, is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it.

"This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application.

"The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water. Streams of water are intended

[1] Vinnius, Comm. ad Inst., lib. ii, t. 1, Text. De Aere, &c.

[2] *Ibid*, Text. De Fluminibus, &c.

[3] 3 Kent, Comm., 439.

for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water some evaporation and decrease of it, and some variations in the weight and velocity of the current. But de minimis non curat lex, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water.

"All that the law requires of the party, by and over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect, the application of the water by the proprietors below on the stream. He must not shut the gates of his dam, and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbour. Pothier lays down the rule very strictly, 'that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below.' But this must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned; otherwise rivers and streams of water would become entirely useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law:—'Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.'"[1]

By Leach, V. C. in Wright v. Howard.—Of the authorities in England, the judgment of Sir John Leach, V. C. (afterwards Master of the Rolls,) in *Wright* v. *Howard*,[2] is frequently cited as containing a lucid and accurate exposition of the law on this subject:—"The law on this subject," said his Honour, "is extremely simple and clear. Primâ facie, every proprietor of land on the banks of a river is entitled to that moiety of the soil of the river which adjoins to his land; and the legal expression is, that each is entitled to the soil

[1] This passage was cited by Parke, B., (afterwards, Lord Wensleydale) in *Embrey* v. *Owen*, (6 Ex. 353), as having correctly and clearly laid down the law upon the matter.

[2] 1 Sim. & St., 190; 1 L J. Ch., 94.

of the river usque filum aquae. Of the water itself there is no separate ownership; being a moving and passing body there can be no property in it. But each proprietor of land on the banks has a right to use it, consequently all the proprietors have an equal right; and, therefore, no one of them can make such an use of it as will prevent any of the others from having an equal use of the stream when it reaches them. Every proprietor may divert the water for the purpose, for example, of turning a mill, but, then, he must carry the water back into the stream so that the other proprietors may in their turn have the benefit of it. His use of the stream must not interfere with the equal common right of his neighbours. He must not injure either those whose lands lie below him on the banks of the river or those whose lands lie above him. Injury may be done to the proprietors below him, by diminishing the quantity of water which descends to them; it may be done to those above him, by returning water upon them so as to overflow their lands or to disturb any of the operations in which they have occasion to use the water—as, for example, by diminishing the extent of its fall. Thus stand the common law principles with respect to the use of the water of rivers."[1]

Modes of disturbance of the right.—Disturbance of the water flowing in a stream may be caused either (i) by the diminution of its natural quantity, such as by diversion or abstraction; or (ii) by the corruption of its natural quality, *e. g.* by pollution; or (iii) by the interruption, acceleration, retardation, or change of direction of its natural course, such as by the construction of a dam, or the erection of any other obstruction.

The first mode of disturbance is an infringement of the right of every riparian proprietor to the natural quantity of water in the stream that passes through or by his land; the second is an infringement of his right to the natural quality of the water; and the third, of his right to the natural flow of the water.

True measure of the right.—But every disturbance of the water following in a stream, caused in any of the modes just stated, does not necessarily amount to a violation of the natural right of a riparian proprietor to the use of the water; for the true measure of his right, as has been uniformly declared in the authorities on the subject, is, not

[1] Cf. *Orr Ewing* v. *Colquhoun*, 2 App. Cas., (839) 854; *Rameshur Pershad Narain Sing* v. *Koonj Behary Pattuck*, 4 App. Cas., 121; L. R. 6 Ind. App. 33; I. L. R., 4 Cal. 633; *Earl of Sandwich* v. *Great Northern Railway*, 10 Ch. D. 707. Monahan's Method of Law, (Apdx.), Secs. 16, 17.

that he should absolutely refrain from causing any change in the flow, or the least diminution of the quantity, or the slightest alteration in the quality, of the water,—in which case, indeed, the right of common use would be altogether illusory,—but that he should have a reasonable use of the water, without interfering with the concurrent enjoyment of a like reasonable use by every other riparian proprietor above, below, or opposite[1] to him. It is when this measure is exceeded, that the user becomes unreasonable and unauthorised, and a legal injury is inflicted upon every riparian proprietor on the banks of the same stream, whether he uses the stream or not.[2]

Reasonable user, how determined.—What this reasonable user, however, is, must depend upon the ever-varying circumstances of each particular case. It is impossible from the very nature of the subject-matter to lay down a more precise rule. But it has been held that in determining whether the user in any given case is reasonable or not, a just regard must be had to the force and magnitude of the current, its height and velocity, the nature and size of the stream, the business, *e. g.*, agricultural or manufacturing, to which the user of it is subservient, the nature of the purpose for which the stream is sought to be used, and the general usage of the country in similar cases.[3]

(a.) Right to the use of water—Distinction between the 'ordinary' and the 'extraordinary' uses of water.—But, although the general rule is that, every riparian proprietor is entitled to a reasonable use of the water, necessarily involving therein the consequence that no use is reasonable which totally deprives another riparian proprietor of the use of the water of the same stream, yet of late years a qualification has been engrafted upon this rule by the highest authorities both in England and America, according to which reasonable use for certain purposes is permitted as legal, even though such use may extend to the consumption of all the available water at any particular time. These have been described as 'ordinary uses,' in England, and 'uses for the purpose of satisfying

[1] *Orr Ewing* v. *Colquhoun*, 2 App. Cas., 839, *per* Lord Blackburn, on p. 855.

[2] *Sampson* v. *Hoddinott* 1 C. B. N. S., 590; 26 L. J. C. P., 150; *Crossley* v. *Lightowler*, L. R. 3 Eq. 296; L. R. 2 Ch. 483; *Bickett* v. *Morris*, L. R. 1 H. L. (Sc.) 47; *Frechette* v. *La Compagnie Manufacturiére de St. Hyacinthe*, 9 App. Cas., 170; *Orr Ewing* v. *Colquhoun*, 2 App. Cas., 839, *per* Lord Blackburn, on p. 855.

[3] Angell on Watercourses (7th ed.) §§ 119-119a, and the cases cited in the notes. See also *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, L. R. 7 H. L. 697, where Lord Cairns, L C. observed that the reasonableness or otherwise of a user depends in some degree on the magnitude of the stream.

natural wants' in America,[1] as contra-distinguished from 'extraordinary uses' or 'uses for the purpose of satisfying artificial wants,' in which last case the rule still is that, no use is reasonable which inflicts a sensible injury upon the other riparian proprietors.

Miner v. Gilmour.—In *Miner* v. *Gilmour*,[2] which came before the Privy Council on appeal from Lower Canada, Lord Kingsdown, after observing that upon the point in question there was no material distinction between the French law prevailing in Lower Canada and the English law, stated the law upon the subject in the following terms, (which, as Lord Blackburn observed in the subsequent case of *Commissioners of French Hoek* v. *Hugo*,[3] 'have often been cited, and always with approval.') :—

"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury."[4]

Ordinary uses.—It has been held that the term 'domestic purposes' extends to culinary and household purposes, and to the cleansing and

[1] *Evans* v. *Merriweather*, 3 Scam. (Ill.) 496, cited in Angell on Watercourses (7th ed.) § 128.

[2] 12 Moo. P. C. C. 131.

[3] 10 App. Cas. 336. See also *Orr Ewing* v. *Colquhoun*, 2 App Cas. 839, where it was cited by Lord Blackburn (on p 855); *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; *North Shore Railway Co.* v. *Pion*, 14 App. Cas. 612, (where this passage is cited with approval).

[4] In the Indian Easements Act (V of 1882), this right is grouped among the rights which every owner of immoveable property possesses to enjoy without disturbance the natural advantages arising from situation. S. 7 of that Act thus defines the extent to which enjoyment of the right may be allowed: "The right of every owner of land abutting on a natural stream, lake or pond, to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purpose of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners." *Illus.* (j).

washing, feeding and supplying the ordinary quantity of cattle,[1]—the uses 'ad lavandum et potandum, aquanda pecora', in the words of Vinnius.

The term would appear to extend also to brewing,[2] and the washing of carriages.[3]

Extraordinary uses.—Under the head of 'extraordinary uses' are generally referred the familiar instances of the use of water for the purposes of manufacture and for hydraulic purposes in general, in which the rule is that, each riparian proprietor is only entitled to a reasonable use of the water, subject to a like reasonable use by every other riparian proprietor above, below, or opposite to him.

"The owner of the banks of a non-navigable river," says Lord Blackburn, "has an interest in having the water above him flow down to him, and in having the water below him flow away from him as it has been wont to do: yet I apprehend that a proprietor may without any illegality build a mill-dam across the stream within his own property and divert the water into a mill-lade without asking leave of the proprietors above him, provided he builds it at a place so much below the lands of those proprietors as not to obstruct the water from flowing away as freely as it was wont; and without asking the leave of the proprietors below him if he takes care to restore the water to its natural course before it enters their land."[4]

Upon this point the law is exactly the same in America[5] as it is in England.

The use of the water of small streams for the purposes of manufacture or for the propulsion of machinery, seems to be so rare in India that one looks in the reports in vain for a case in which any question has ever been raised or discussed as to the extent of the right of a riparian proprietor to use water for such purposes.

The abstraction of water from a stream for the purposes of supply-

[1] *Attorney-General* v. *Great Eastern Railway Co.*, 23 L. T. N. S. 344; L. R. 6 Ch. 572.

[2] *Wilts and Berks Canal Navigation Co.* v. *Swindon Waterworks Co*, L. R. 9 Ch. 457, *per* James, L. J.

[3] *Busby* v. *Chesterfield Water Co.*, E. B. & E. 176.

[4] *Orr Ewing* v. *Colquhoun*, 2 App. Cas. (839) 856. Cf. *Earl of Sandwich* v. *Great Northern Railway Co.*, 10 Ch. D. 707; *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305.

[5] *Tyler* v. *Wilkinson*, 4 Mason, (Amer.) 400; *Elliott* v. *Fitchburg, R. R. Co.*, 10 Cush. (Amer.) 193; Angell on Watercourses (7th ed.) § 95, and cases cited in the notes; Gould on Waters, §§ 205—206.

ing an adjacent town[1] or even a gaol or lunatic asylum,[2] has been held to be a use more extensive than that to which a riparian owner has the right to apply the water.

Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co. —In the *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*,[3] in which the water was abstracted from a stream by a waterworks company, who were riparian owners, and collected into a permanent reservoir for the supply of an adjacent town, Lord Cairns, L. C., advising the House of Lords, said:—

"Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said, ad lavandum et ad potandum, whatever portion of the water may be thereby exhausted, and may cease to come down by reason of that use. But farther, there are uses no doubt to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before. Again, it may well be that there may be a use of the water by the upper owner, for, I will say, manufacturing purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable use. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water.

"But, my Lords, I think your Lordships will find that, in the present

[1] *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, L. R. 7 H. L. 697; L. R. 9 Ch. 451.

[2] *The Medway Navigation Co.* v. *The Earl of Romney*, 9 C. B, N. S. 575; 30 L. J. C. P. 236.

[3] L. R. 7 H. L. 697.

case, you have no difficulty in saying whether the use which has been made of the water by the upper owner, comes under the range of those authorities which deal with cases such as I have supposed, cases of irrigation and cases of manufacture. Those were cases where the use made of the stream by the upper owner has been for purposes connected with the tenement of the upper owner. But the use which here has been made by the appellants of the water, and the use which they claim the right to make of it, is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream—as great a diversion as if they had changed the entire water-shed of the country, and in place of allowing the stream to flow towards the south, had altered it near its source, so as to make it flow towards the north. My Lords, that is not a user of the stream which could be called a reasonable user by the upper owner; it is a confiscation of the rights of the lower owner; it is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes, and that is done, not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties, who have no connection whatever with any part of the stream."

In *Norbury* v. *Kitchin*,[1] Martin, B., in his direction to the jury ruled that, a riparian proprietor could only take water for some purpose of utility, and not for the purpose of making an ornamental pond.

Limits of 'extraordinary uses.'—The rule, therefore, deducible from the observations made in these two cases is, that in the case of what are called 'extraordinary uses,' the user, besides being reasonable, must be for purposes of utility and for purposes beneficial to the riparian estate.

The decision of Vice-Chancellor Bacon in *Earl of Sandwich* v. *The Northern Railway Co.*,[2] however, does not appear to be quite in harmony with this rule. There, the defendant, railway company, who were riparian proprietors, by reason of their line abutting on a stream, took water from it to supply their locomotive engines. A lower riparian proprietor disputed their right to do so, on the ground that the water was taken for purposes not connected with the riparian estate. His Honour held that the abstraction of a reasonable quantity of water for such purposes was justifiable. It would be difficult to reconcile this decision with the rule laid down by Lord Cairns, L. C., in *The Swindon Waterworks Co.* v. *The Wilts & Berks Canal Navigation Co.*,[3] to which I have just referred,

[1] 3 F. & F. 292; 9 Jur. N. S. 132. [2] 10 Ch. D. 707. [3] L R. 7 H. L. 697.

unless the whole of the railway system of the defendant, company, despite the fact that it was the nature of the engines of the company to travel great distances, were regarded as composing the riparian estate, and the user as being for purposes connected with such estate. The decision of Shaw, C. J. in *Elliot* v. *Fitchburg R. R. Co.*,[1] which was also an action against a railway company, for abstraction of water from a stream for the supply of their locomotive engines might, however, be cited as sustaining the same view of the law.

Diversion of water for irrigation.—The abstraction or diversion of water from a stream for the irrigation of a riparian estate, has been stated by Lord Kingsdown as well as by Lord Cairns, in the cases I have already cited, as being an 'extraordinary use' of the water; and so the law, undoubtedly, has always been in England, and is at the present day in America.

In England, the reported cases dealing with the use of water for the purposes of irrigation are very few. *Sampson* v. *Hoddinott*,[2] where the diversion and detention of water by the defendant for the irrigation of his field was held to be too extensive to be justifiable, and *Embrey* v. *Owen*,[3] where such diversion for the purposes of irrigation did not exceed the limits of reasonable enjoyment of the water, and was therefore held to be not actionable, establish the proposition that a riparian proprietor may draw water from a stream for the irrigation of his land only so long as he does not thereby interfere with the reasonable enjoyment of the same common benefit by other riparian proprietors.

In America, the older cases laid down that, if a riparian proprietor diverted water from a natural stream running through his land, to fertilise his meadows, such diversion was lawful, even though the whole of the water was thereby absorbed on the land, or only a bare sufficiency for domestic purposes and for watering cattle was left to the riparian proprietor below. But later cases have deviated from this rule, and have placed the law on this subject on precisely the same footing as that on which it has always stood in England. In this country, the law upon this point has always been in exact accordance with the law of England.[4]

[1] 10 Cush., 195, cited in Angell on Watercourses (7th ed.) § 177, note 2.

[2] 1 C. B. N. S. 611; 26 L. J. C. P. 150.

[3] 6 Ex. 353; 20 L. J. Ex. 212.

[4] *Maggun Chuckerbutty* v. *Bhoobun Mohun Bhooya*, Cal. S. D. 1857, p. 1324; *Muthoora Mohun Mytee* v *Mohendra Nath Pal*, Cal. S. D. 1860, p. 301; *Sheikh Monour Hossein* v. *Kanhya Lal*, 3 Suth. W. R. 218; *W. Sardowan* v. *Hurbuns Narain Sing*, 11 Suth. W. R. 254; *The Court of*

Evans v. Merriweather.—While upon this subject it may be instructive to refer at some length to the very lucid and valuable judgment of the Supreme Court of Illinois in *Evans* v. *Merriweather*,[1] which is also a leading case on this topic. "Each riparian proprietor" said the Court, "is bound to make such a use of running water, as to do as little injury to those below him as is consistent with a valuable benefit to himself. The use must be a reasonable one. Now the question fairly arises, is that a reasonable use of running water by the upper proprietor, by which the fluid is entirely consumed? To answer this question satisfactorily it is proper to consider the wants in regard to the element of water. These wants are either natural or artificial. Natural are such as are absolutely necessary to be supplied in order to his existence. Artificial, such only as, by supplying them, his comfort and prosperity are increased. To quench thirst, and for household purposes, water is absolutely indispensable. In civilized life, water for cattle is also necessary. These wants must be supplied, or both man and beast will perish. The supply of a man's artificial wants is not essential to his existence; it is not indispensable; he could live if water was not employed in *irrigating* lands, or in propelling his machinery. In countries differently situated from ours, with a hot and arid climate, water doubtless is indispensable to the cultivation of the soil, and in them, water for *irrigation* would be a natural want. Here it might increase the products of the soil, but it is by no means essential, and cannot, therefore, be considered a natural want of man. So of manufactures, they promote the prosperity and comfort of mankind, but cannot be considered absolutely necessary to his existence." These considerations led the Court to the conclusion, which it thus stated:—"That an individual owning a spring on his land, from which water flows in a current through his neighbour's land, would have the right to use the whole of it, if necessary to satisfy his natural wants. He may consume all the water for his domestic purposes, including water for his stock. If he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower pro-

Wards v. *Rajah Leelanund Sing Bahadoor*, 13 Suth. W. R. 48; *Heeranund Sahoo* v. *Khubeeroonnessa*, 15 Suth. W. R. 516; *Chumroo Sing* v. *Mullick Khyrut Ahmed*, 18 Suth. W. R. 525 *Rayappan* v. *Virabhadra*, I. L. R. 7 Mad. 530; *Perumal* v. *Ramasami*, I. L. R. 11 Mad. 16.

[1] 3 Scam. (Ill.) 496, cited in Angell on Watercourses (7th ed.) § 128.

prietor. Where the stream is small, and does not supply water more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufactures. So far, then, as natural wants are concerned, there is no difficulty in furnishing a rule by which riparian proprietors may use flowing water to supply such natural wants. Each proprietor in his turn may, if necessary, consume all the water for these purposes. But when the water is not wanted to supply natural wants, and there is not sufficient for each proprietor living on the stream to carry on his manufacturing purposes, how shall the water be divided? We have seen, that, without a contract or grant, neither has a right to use all the water; all have a right to participate in its benefits. Where all have a right to participate in a common benefit, and none can have an exclusive enjoyment, no rule, from the very nature of the case, can be laid down, as to how much each may use without infringing upon the rights of others. In such cases, the question must be left to the judgment of the jury, whether the party complained of has used, under all the circumstances, more than his just proportion."

How far does this case agree with the English authorities?—This case shows that in America and even in England, the rule which divides the use of water of a natural stream into such as are 'ordinary' and such as are 'extraordinary,' or to adopt the language of the American Court, into 'uses for the supply of natural wants,' and 'uses for the supply of artificial wants,' is not so inflexible as the statement of the law by Lord Kingsdown in *Miner* v. *Gilmour*,[1] might perhaps lead one to suppose; and that although in both countries, irrigation is regarded as an artificial want and the diversion of water for that purpose as an extraordinary user of it, yet in countries with a hot and arid climate, water may be as much indispensable to the cultivation of the soil as it is for the quenching of the human thirst; that in such countries, irrigation would be referred to the class of 'natural wants' to which 'artificial wants' must always be legally subservient.

This opinion of the American Court concides with the view suggested by Brett, M. R., in a recent case[2] arising out of the use of water for

[1] 12 Moo. P. C. C. 131.

[2] *Ormerod* v. *Todmorden Joint Stock Mill Co.*, 52 L. J. Q B. p. 450; 11 Q. B. D. p. 168; (the report of the judgment in the Law Reports is somewhat different from that in the Law Journal).

manufacturing purposes, where he has shown that the use of water which would be extraordinary in one place, might, by reason of the surrounding circumstances be regarded as ordinary in another, and further that, owing to changes happening in the locality or otherwise, the use that at one time would be considered extraordinary might at another be deemed ordinary. His Lordship said, according to the report in the Law Journal:—"And I agree that it is impossible to negative the proposition that a use which may at one time have been extraordinary, may by changes in the condition of things become ordinary, and that a use of water which might be extraordinary in an agricultural district may not be extraordinary in a manufacturing district; and I am not prepared to hold that in such a district where the use of water for the purpose of drinking or of irrigation has become obsolete, the use of water for manufacturing purposes may not be an ordinary use."

Class under which diversion of water for irrigation falls according to Anglo-Indian law.—Owing to agriculture being the leading industry in India, the use of water by riparian proprietors is mainly confined to purposes of irrigation; and the terms in which the law regarding the right to the use of water for such purposes has from time to time been enunciated by the Courts in India,—restricting the right of each riparian proprietor to a reasonable use of it, so that no sensible injury is thereby inflicted upon the other riparian proprietors[1]—doubtless show that they treat such user as an 'extraordinary use' of water; and the Indian Easements Act (V of 1882) s. 7. illustration (j), which qualifies the right of a riparian proprietor to use the water for purpose of irrigation or manufacture by the proviso that he does not thereby cause material injury to other like proprietors, adopts the same view of the law. But this Act has not operation throughout the whole of India,[2] and it may therefore be a question, whether regard being had to judicial opinions coming from quarters of such eminent authority, as those to which I have just referred, the dry and arid climate of some parts of India might not justly demand the inclusion of the use of water for purposes of irrigation under the category of 'ordinary uses,' and so warrant its appropriation to an extent ever so much prejudicial to the interests of the lower riparian proprietors.

Extent of the right to divert water for irrigation.—But, although a

[1] *Supra*, 282, *in fin.*

[2] Originally the Act was in force in Madras, Central Provinces and Coorg only, but now by Act VIII of 1891, it has been extended to Bombay, North-Western Provinces and Oudh.

riparian proprietor has the right to use and consume the water of a natural stream for the purpose of irrigating his land, it does not follow that he has the right to do so, however extensive his land, and however small its abutment on the stream may be. The reasonableness or otherwise of the use must be determined by the size of the field, the length of its frontage, the magnitude of the stream, and the demand for water by other riparian proprietors for similar or other purposes. In *Embrey* v. *Owen*,[1] the Court said that, the use of water for irrigation would not in every case be deemed a lawful enjoyment of the water, though it were again returned into the river with no other diminution than that which was caused by the absorption and evaporation of it; that this must depend upon the circumstances of each case; for, on the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil abutting upon a part of a stream, would be allowed to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of the water, though there was no other loss to the natural stream, than that arising from the necessary absorption and evaporation of the water employed for that purpose; but that, on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into a stream in order to water his garden. It is thus, the Court added, entirely a question of degree and that it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but that there is often no difficulty in deciding whether a particular case falls within the permitted limits or not.

(b) Right to the purity of water—Every riparian proprietor has a right that the water of a natural stream passing through or by his land shall flow to him not only undiminished in quantity, but also undeteriorated in quality.[2] Consequently, any use of a stream by a riparian proprietor which defiles and corrupts it to such a degree as essentially to impair its purity, and prevent the use of it for any of the ordinary purposes, such as irrigation, propelling of machinery or consumption for domestic use, is an infringement of the right of the other riparian proprietors, for which they are entitled to a remedy.

What kinds of pollution are actionable?—Various sources of pollution have been held by the Courts to be actionable, *e. g.*, setting up cattle-yards or lime-pits for calf and sheep skins so near the water as to pollute

[1] 6 Ex. 353; 20 L. J. Ex. 212.

[2] Monahan's Method of Law, (Apdx.) s. 17.

it;[1] erecting a cess-pool, or placing manure so near a stream as to contaminate it,[2] casting upon one's land dirt and foul water or substances which reach the stream by percolation;[3] letting off water made noxious by precipitation of minerals,[4] or dye-wares or potash,[5] or sulphuric acid[6] or muriatic acid[7], whereby the boilers and machinery of a lower riparian proprietor are corroded; discharging sewage[8] or even hot water into a stream,[9] or rendering the water unfit for household or manufacturing purposes[10] or for cattle to drink of[11] or for fish to live in.[12] It is also an invasion of the rights of other riparian proprietors; if any one of them uses the water in such a manner as to corrupt the atmosphere; for instance, where a mill-dam overflows the adjacent lands and renders the atmosphere so impure and unsalubrious as to create disease and sickness, the owner of the dam is held responsible for the consequences.[13]

When does pollution become actionable?—But the pollution or corruption of a stream by the discharge of sewage or any other waste or impure matter does not in every case amount to an unreasonable or unlawful use of it. Whether the use is reasonable or not, must, as in the case of abstraction, diversion or detention of water, be decided by a consideration of the peculiar circumstances of each case. Pollution of a certain kind, or to a certain degree, which might be of no consequence in some streams, might seriously affect the usefulness of others, or vice versâ.

[1] See *Moore* v. *Webb*, 1 C. B. N. S. 673; Coulson & Forbes' Law of Waters, 170.

[2] *Norton* v. *Scholefield*, 9 M. & W. 565; *Womersley* v. *Church*, 17 L. T. N. S. 190; *Hipkins* v. *Birmingham Gas Light Co.*, 6 H. & N. 250; 5 H. & N. 74.

[3] *Hodgkinson* v. *Ennor*, 4 B. & S. 229; *Wright* v. *Williams*, 1 M. & W. 77.

[4] *Ibid.*

[5] *Wood* v. *Sutcliffe*, 16 Jur. 75; 2 Sim. N. S. 163.

[6] *Pennington* v. *Brinsop*, 5 Ch. D. 769.

[7] *Stockport* v *Potter*, 7 H. & N., 160.

[8] *Attorney-General* v. *Cockermouth*, L. R. 18 Eq. 172; *Attorney-General* v. *Leeds*, L. R. 5 Ch. 533; *Attorney-General* v. *Colney Hatch*, L. R. 4 Ch. 146; *Attorney-General* v. *Birmingham*, 4 K. & J., 528.

[9] *Mason* v. *Hill*, 2 B. & A. 304; *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. (Ex.) 305; *Tipping* v. *Eckersley*, 2 K. & J., 264.

[10] *Goldsmid* v. *Tunbridge Wells*, L. R. 1 Ch. 349; *Booth* v. *Rattle*, 15 App. Cas. 188.

[11] *Attorney-General* v. *Birmingham*, 4 K. & J., 528; *Manchester Railway* v. *Workshop*, 23 Beav. 198; *Attorney-General* v. *Luton*, 2 Jur. N. S. 181; *Oldaker* v. *Hunt*, 6 DeG. M. & G. 376.

[12] *Bidder* v. *Croydon*, 6 L. T. N. S. 778; *Attorney-General* v. *Birmingham*, 4 K. & J. 528; *Attorney-General* v. *Luton*, 2 Jur. N. S. 181.

[13] Angell on Watercourses (7th ed.), § 137.

In all such cases, the fact should always be borne in mind that the right of one riparian proprietor to have the stream descend to him in its pure state must yield in a reasonable degree to the equal right of the upper riparian proprietors, whose use of the stream for domestic purposes, for the purposes of irrigation, manufacture, or turning the wheels of machinery, will tend to make the water more or less impure, specially when the population becomes more and more dense.

The Indian Easements Act, s. 7.—The reports do not furnish us with a single instance in which a question relating to the corruption of a stream by a riparian proprietor has come for consideration before the Courts in this country. This is probably due to the fact that the few manufactories that exist in India at the present day, are generally situated on the banks of large navigable rivers and at considerable distances from each other, so that the pollution of their water occasioned by manufacturing operations is scarcely, if ever, found to inflict any sensible injury upon the other riparian proprietors. The Indian Easements Act (V of 1881), s. 7, illustration (f), however, recognises "the right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons." It is thus evident that this Act regards unreasonable pollution of water as an actionable wrong, whether such water flows in a superficial or subterranean stream, or whether such water flows as mere surface drainage or percolates underground without any defined course. This accords with the law in England,[1] as I shall have occasion to point out in the next lecture.

Whether previous pollution is any justification.—There are one or two other points connected with the pollution of streams which it may perhaps be useful to notice now. Previous pollution of a stream by other persons, it has been held, does not justify a riparian proprietor in adding to the impurity of the water. This was particularly noticed by Lord Chelmsford, L. C. in *Crossley* v. *Lightowler*,[2] in which his Lordship remarked that where there are many existing nuisances, either to air or water, it may be very difficult to trace to its source the injury occasioned by any one of them; but if the defendants in that suit were to add to the former

[1] *Hodgkinson* v. *Ennor*, 4 B. & S. 229; 32 L. J. Q. B. 31; *Womersley* v. *Church*, 17 L. T. N. S. 190; *Ballard* v. *Tomlinson*, 26 Ch. D. 194; reversed on appeal, 29 Ch. D. 115.

[2] L. R. 3 Eq. 296; L. R. 2 Ch. 483.

foul state of the water, and yet were not to be responsible on account of its previous condition, this consequence would follow—that if the plaintiffs were to make terms with the other polluters of the stream, so as to have the water free from impurities caused by their works, the defendants might say;—'We began to foul the stream at a time when as against you it was lawful for us to do so, inasmuch as it was unfit for your use, and you cannot now, by getting rid of the existing pollutions from other sources, prevent our continuing to do what, at the time when we began, you had no right to object to.'

The same view of the law is expressed, if in somewhat technical language, by Lord Justice (then Justice) Fry in the case of *Pennington* v. *Brinsop Hall Co.*[1] "I may observe in passing," said his Lordship," that the case of a stream affords a very clear illustration of the difference between injury and damage; for the pollution of a clear stream is to a riparian proprietor below, both an injury and damage, whilst the pollution of a stream already made foul, unless by other pollutions, is an injury without damage, which would, however, at once become both injury and damage on the cessation of the other pollutions."

On the same principle, pollution of the water of a stream cannot be justified on the ground that it is caused by the exercise of lawful trades carried on in a reasonable and proper manner, in the course of which it becomes necessary to dispose of refuse matter and other filth, which is produced in manufacturing processes.[2]

(c) Right to the flow of Water.—Every riparian proprietor has also a right to the flow of the stream without interruption and without any material alteration in velocity or direction. It is generally, if not always, distinct from the right to the natural quantity and quality of the water of the stream, for it is quite clear that the volume and purity of the water may remain unaffected, and yet there may be a substantial change in the force and direction of its flow.

Though all persons have equal right to erect hydraulic works on their own land, yet they must so construct them, and so use the water, that all persons below may participate, without interruption, in the reasonable enjoyment of the same water. A mill-owner, for instance, who shuts down his sluice-gate, and detains the water for an unreasonable time, and

[1] 5 Ch. D. 769. Cf. *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305.

[2] *Stockport* v. *Potter*, 7 H. & N. 160; 31 L. J. Ex. 9. Cf. *Hipkins* v. *Birmingham*, 6 H. & N. 250; 5 H. & N. 74.

thus deprives others of a fair participation of the benefits of the stream, commits an actionable wrong.[1] So also, if a mill-owner accumulates the volume of water and then discharges it in excessive quantities, beyond what is incident to the necessary or reasonable use of his mill,[2] or increases the natural flow of the stream by artificial means, as by turning into his mill-pond the waters of another stream which do not naturally flow there, he becomes liable to an action for injury so caused to another riparian proprietor.[3]

Robinson v. Lord Byron.—In *Robinson* v. *Lord Byron*,[4] the Court of Chancery granted an injunction to restrain Lord Byron from preventing water flowing to a mill, or letting a greater quantity of water than usual to flow down to the mill. It appeared in that case that since the 4th April, 1785, Lord Byron, who had large pieces of water in his park supplied by the stream which flowed to the mill, had at one time stopped the water and at another let it down in such quantities as to endanger the safety of the mill, and the Lord Chancellor thereupon granted an injunction to restrain the defendant from using dams and other erections, 'so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before the 4th of April.'

Bickett v. Morris.—The Scottish case of *Bickett* v. *Morris*,[5] also illustrates the same principle of law. There, a proprietor on one side of a non-navigable river extended his building into the alveus or bed, so as to cause an alteration of the current of the stream with reference to the land of the proprietor on the other side. The party complaining was unable to show any actual damage. The Court of Session held that, a riparian proprietor is not entitled to erect a building or make any material changes in the alveus of the stream; for if he does so, although the opposite proprietor may be unable to prove that any damage has actually happened to him, yet if the encroachment is of a substantial kind and certainly calculated to effect some deviation in the course of the water, the alteration

[1] *Shears* v. *Wood*, 7 Moo. 345; 1 L. J. C. P. 3; *Williams* v. *Morland*, 2 B. & C. 910 2 L. J. K. B. 191; Angell on Watercourses (7th ed.) § 115, and the cases cited therein.

[2] *Frechette* v. *La Compagnie Manufacturière de St. Hyacinthe*, 9 App. Cas. 170.

[3] Gould on Waters, § 218, and the cases cited therein.

[4] 1 Bro. C. C. 588.

[5] L. R. 1 H. L. (Sc. App.) 47. This case has been explained by the House of Lords in *Orr Ewing* v. *Colquhoun*, 2 App. Cas., 839, and by the Privy Council in *Kali Kissen Tagore* v. *Jodoo Lall Mullick*, L. R. 6 Ind. App. 196; 5 Cal. L. R. 97. See *Booth* v. *Rutté*, 15 App. Cas. 188.

must always involve some risk of injury. On appeal this judgment was affirmed by the House of Lords.[1] Lord Chelmsford, L. C., said:—"The proprietors on the opposite banks of a river have a common interest in the stream, and although each has a property in the alveus from his own side to the medium filum fluminis, neither is entitled to use the alveus in such a manner as to interfere with the natural flow of the water. My noble and learned friend, the late Lord Chancellor, during the argument put this question:—'If a riparian proprietor has a right to build upon a stream, how far can this right be supposed to extend? Certainly (he added) not ad medium filum, for if so, the opposite proprietor must have a legal right to build to the same extent from his side.' It seems to me to be clear that neither proprietor can have any right to abridge the width of the stream, or to interfere with its regular flow; but anything done in alveo which produces no sensible effect upon the stream is allowable."

Lord Westbury concluded by saying:—"It is wise, therefore, to lay down the general rule, that even though immediate damage cannot be described, even though the actual loss cannot be predicated, yet if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury, which the Courts will take notice of as an encroachment, which adjacent proprietors have a right to have removed."

Kali Kissen Tagore v. Jodoo Lal Mullick.—In *Kali Kissen Tagore* v. *Jodoo Lal Mullick*,[2] the Privy Council adopting the ratio decidendi of the judgment in the case just mentioned, as pointed out by Lord Blackburn in *Orr Ewing* v. *Colquhoun*,[3] held that where the encroachment on the bed of the stream (in that case a non-navigable one) is so slight as not to cause any sensible alteration in the flow of the water, it is not such an injury to the right of the proprietor on the opposite side as would sustain an action.

Overflowing land above or below.—Without a grant, covenant, or prescription, a riparian proprietor has no right to bank up and pen back the water of a natural stream, and thereby inundate or overflow the

[1] In America the law is otherwise. There it is necessary to show that essential damage has been or is likely to be sustained by reason of the erection on the alveus. *Norway Plain Co.* v. *Bradley*, 52 N. H. (Amer.) 108.

[2] L. R. 6 Ind. App. 190; 5 Cal. L. R. 97.

[3] 2 App. Cas. 839.

lands of riparian proprietors and other landowners above him;[1] nor has he a right to discharge the water of the stream so vehemently and in such excessive quantity as to overflow the lands of riparian proprietors and other landowners below him.[2] Such acts amount to an illegal and unauthorised appropriation of the lands of others persons, and a nuisance is thereby committed for which the person injured may recover damages suffered by him, and may also obtain an injunction to prevent repetition of them in future.

[1] *Aldred's case*, 9 Rep. 59; *Cooper* v. *Barber*, 3 Taunt. 79; *Wright* v *Howard*, 1 Sim. & St. 190; 1 L. J. Ch. 94; Angell on Watercourses (7th ed.) § 330; Gould on Waters, §§ 210-211c; Goddard on Easements (3rd ed.), 300; *Becharam Chowdhry* v. *Puhubnath Jha*, 2 B. L. R. (Apdx.) 53; *Subramaniya Ayyar* v. *Rama Chandra Rau*, I. L. R. 1 Mad. 335; *Abdul Hakim* v. *Gonesh Dutt*, I. L. R. 12 Cal., 323; *Imam Ali* v. *Pores Mundul*, I. L. R. 8 Cal., 468; 10 Cal. L. R. 396: *Ram Chandra Jana* v. *Jiban Chandra Jana*, 1 B. L. R. (A. C.) 203. Owners of non-riparian lands are also entitled to use the stream for drainage, and if their lands be overflowed by the setting back of the water of the stream, they are entitled to recover damages. Gould on Waters, § 210.

[2] Angell on Watercourses (7th ed.) § 335.

LECTURE XI.

RIPARIAN RIGHTS.—(*Continued*).

Obligations of the owner of land in which a spring arises or upon which rain falls, when the water originating from such sources flows on in a defined channel—His obligations, when such water does not flow in a defined channel—*Broadbent* v. *Ramsbotham*—*Muggun Chuckerbutty* v. *Bhoobun Mohun Bhooya*—The Indian Easements Act s. 7, illust. (g)—Summary of the doctrines followed in the different States in America—Rights in a natural stream, when it receives a portion of its supply from artificial sources—How far riparian rights may be granted to a non-riparian proprietor—*Stockport Waterworks Co.* v. *Potter*—*Ormerod* v. *Todmorden Mill Co.*—Opinion of Lord Bramwell—*Kensit* v. *Great Eastern Railway Co.*—Result of the authorities—*Nuttall* v. *Bracewell*—*Crossley* v. *Lightowler*—Theory of title by appropriation—*Mason* v. *Hill*—Mr. Angell's argument—Whether proof of actual perceptible damage essential to sustain an action for infringement of riparian rights—Whether apprehension of possible damage necessary—Surface drainage—Rights and obligations of adjoining landowners with respect to surface drainage—Whether a proprietor of lower land has any right to prevent the flow of surface drainage from land higher above—Roman law—French law—English law—Anglo-Indian law—Extent of the right of the proprietor of higher land to discharge surface drainage—Argument in support of a right to a reasonable user—Doctrine of reasonable user not countenanced in England—Liability of the proprietor of higher land, when the surface drainage, in consequence of change of level of that land, causes damage to the proprietor below—Subterranean stream—Rights and obligations of landowners with regard to water running in subterranean streams—*Dickinson* v. *Grand Junction Canal Co.*—Extent of the rights of landowners with regard to the use of the water of subterranean streams—Subterranean percolation—Rights and obligations of landowners with regard to subterranean percolations—*Acton* v. *Blundell*—*Chasemore* v. *Richards*—*New River Co.* v. *Johnson*—*Ballacorkish Silver Lead and Copper Mining Co.* v. *Harrison*—*Grand Junction Canal Co.* v. *Shugar*—Roman and Scottish law—Whether, according to English law, presence of malice creates any legal responsibility in the person intercepting subterranean percolation—American view—Discussion of the point—Pollution of surface drainage and subterranean percolations—*Hodgkinson* v. *Ennor*—*Ballard* v. *Tomlinson*.

I have in the preceding lecture dealt generally with the nature and mode of enjoyment of the rights which riparian proprietors possess in natural streams flowing through or by their lands. I shall now proceed to discuss some collateral topics which occasionally arise in connection with the use of the water of such streams, as well as to point out to you the nature of the rights of landowners in respect of surface drainage, subterranean streams and subterranean percolations.

Obligations of the owner of land in which a spring arises or over which rain falls, when the water originating from such sources flows on

in a defined Channel.—The first question that I shall deal with is, as to the rights and obligations of the owner of the land in which a spring arises or over which rain falls or within which a pool or a lake lies, when the water originating from such sources flows on in a defined channel. I have, to some extent, already anticipated the answer to this question in endeavouring to ascertain the point from which a river or stream may in contemplation of law be said to begin.[1] It is, as I have pointed out, the natural and defined channel made by flowing water, however minute such channel may be, that establishes legal relations or creates correlative rights and obligations between persons through or by whose lands the channel runs. If such channel commences at the source of the spring,[2] or at so short a distance from it that the intervening space could not have been furrowed into a defined channel by the water flowing over it,[3] or if it begins from the margin of the pool or lake[4], the case is simple enough. The owner of the land in which the spring arises or within which the pool or lake lies is in that case brought within the range of those legal relations which the flow of water in a well-defined natural channel creates, and in respect of the use of the water of the spring the law casts upon him the same obligation as that which it does upon the lower riparian proprietors situated on or along the channel, whether the supply from such sources be perennial or intermittent.[5] So too, the owner of the land on which rain falls, becomes subject to riparian obligations in respect of those waters, that flow beyond his boundary in a defined channel.[6]

In *Dudden* v. *The Guardian of Clutton Union*,[7] Pollock, C. B., said:—"If there is a natural spring, the water from which flows in a natural channel, it cannot be lawfully diverted by any one to the injury of the riparian proprietors"—"This was a natural spring, the waters of which

[1] *Supra*, 78-80.

[2] *Dudden* v. *Guardians of Clutton Union*, 11 Ex. 627; 26 L. J. Ex. 146 Cf. *Van Breda* v. *Silberbauer*, L. R. 3 P. C. (88) 99; *Commissioners of French Hoek* v. *Hugo*, 10 App. Cas 336. See observations of Erle C. J. in *Gaved* v. *Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 363.

[3] *Ennor* v. *Barwell*, 2 Giff. 410; 6 Jur. N. S. 1233.

[4] Monahn's Method of Law, (Apdx.). s. 20. It has been held by the Madras High Court that, if the surplus water of a tank flows in a defined natural channel, riparian relation is thereby established between the owner of the land in which the tank lies and every other person through whose land the channel passes. *Rayappan* v. *Virabhadra*, I. L. R. 7 Mad. 530.

[5] *Perumal* v. *Ramasami*, I. L. R., 11 Mad. (16) 18.

[6] *Ibid.* Cf. *Rayappan* v. *Virabhadhra*, I. L. R. 7 Mad. 530.

[7] 11 Ex. 627; 26 L. J. Ex. 146.

had acquired a natural channel from its source to the river." And Martin, B., said :—" A river begins at its source, when it comes to the surface, and the owner of the land on which it rises cannot monopolise all the water at the source so as to prevent its reaching the lands of other proprietors lower down."

His obligations, when such water does not flow in a defined channel.—But, if the channel does not begin at the spring-head, or if the water falling as rain from the sky or oozing out from a swamp or a bog or overflowing from a pool or lake, flows over the land as mere surface water in no definite channel, even though such water afterwards feeds a well-defined natural watercourse, no legal relations are established between the owner of the land in which the spring arises or over which such surface water flows, and the riparian owners through or by whose lands such watercourse runs. Such water is, in the eye of the law, the moisture and a part of the soil, and belongs to the owner of the land upon which it is found, to be used by him, if to his advantage, or to be got rid of by him in any mode he pleases, if to his detriment.

Broadbent v. Ramsbotham.—The judgment of the Court of Exchequer in the leading case of *Broadbent* v. *Ramsbotham*,[1] quoted with approbation by Mr. Justice Wightman in the opinion which he delivered on behalf of the the learned Judges, who had been summoned to attend the House of Lords in the case of *Chasemore* v. *Richards*,[2] and recognised by the House of Lord sitself as a sound exposition of the law on the subject, is generally cited as an authority for this doctrine. In that case, the plaintiff had worked his mill for fifty years by the stream of a brook which was supplied by the water of a basin or pond formed by landslips and filled by rain, a shallow well supplied by subterranean water, a swamp adjoining thereto, and a well formed by a stream springing out of the side of a hill; the waters of all which occasionally overflowed and ran down the defendant's land in no definite channel into the brook. The defendant, for agricultural and other useful purposes, had dug a drain in his land, the effect of which was to divert these sources of supply to the brook. The action was for this diversion, and the Court of Exchequer held that the plaintiff had no right, as against the defendant, to the natural flow of any of the waters,

[1] 11 Ex. 602; 25 L. J. Ex. 115. Cf. *Rawstron* v. *Taylor*, 11 Ex. 369; 26 L. J. Ex. 33; *Greatrex* v. *Hayward*, 8 Ex. 291; 22 L. J. Ex. 137.

[2] 7 H. L. C. 349; 29 L. J. Ex. 81; 5 Jur. N. S. 873.

and was not entitled to recover. Baron Alderson, in delivering the judgment of the Court, said:—"Now, we think that this water, both that which overflows and that which sinks in, belongs absolutely to the defendant on whose land it arises, and is not affected by any right of the plaintiff. The right to the natural flow of the water in the brook undoubtedly belongs to the plaintiff; but we think this right cannot extend further than a right to the flow in the brook itself, and to the water flowing in some defined natural channel, either subterranean or on the surface, communicating directly with the brook itself. No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which it runs, must, by the natural force of gravity, find its way to the bottom and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel. In this case a basin is formed in his land, which belongs to him, and the water from the heavens lodges there. There is here no watercourse at all. If this water exceeds a certain depth, it escapes at the lowest point, and squanders itself (so to speak) over the adjoining surface. The owner of the soil has clearly a right to drain this shallow pond and to get rid of the inconvenience at his own pleasure....The same may be said of the swamp of sixteen perches, which is merely like a sponge fixed (so to speak) on the side of the hill, and full of water. If this overflows it creates a sort of marshy margin adjoining; and there is apparently no course of water either into or out of it, on the surface of the land....The well at this point is also in simili casu. It is not found in the case that it has any subterranean communication with the brook. But no doubt, when this well overflows, the overflow pours itself over and down the declivity towards the brook. But this gives no right to the water." As to the well formed by a stream springing out of the side of a hill, the waters of which occasionally overflowed and ran down the defendant's land in no definite channel into the brook, the Court said:—"There is also, we think, nothing found to take the water from this well out of the same class as the three former cases; we must consider the stream at its beginning and not after it has arrived at the natural valley communicating with the reservoir. If the water after having arrived there had been then diverted, the case would be different. The water falling from heaven on the side of the

hill, we have before said, may be appropriated, though not after it has once arrived at a defined natural course; and the question here is, whether this water in its first origin, and before it has arrived at any defined natural watercourse conveying it onwards towards the brook, has not been intercepted by the defendant's drain and so appropriated by him; and we think it has. For what are the facts? The water in dispute is only the overflow of a well, and the well is now prevented from overflowing; but when before it did overflow, it ran into a ditch (the lowest adjoining ground) made artificially and for a different purpose, running beside a hedge. This was no natural defined watercourse. After this, it squandered itself over a swamp made by the feet of cattle treading about, and it is not till long after this, that what still remained of it found its way into what may then perhaps be correctly called a definite natural watercourse, receiving this and probably other water from other sources also."

Maggun Chukerbutty v. Bhoobun Mohun Bhooya.—This decision has been followed in India in several cases,[1] and a similar doctrine has been laid down. In *Maggun Chuckerbutty* v. *Bhoobun Mohun Bhooya*,[2] in the Court of the Sudder Dewani Adawlat at Calcutta, the water arising from excessive rain and floods, flowed over the surface of the defendant's high land to that of plaintiff's, where they formed three different channels by means of which plaintiff irrigated his lands. The defendant erected on his own lands an embankment by means of which the flow of the surface waters was arrested and prevented from reaching the channel on plaintiff's land. Plaintiff thereupon brought an action for the removal of this embankment. The Court in the course of its judgment observed:—"That after waters have reached a natural channel, each party through whose land it flows, has a right to the advantage of the stream flowing in its natural course over his land, and to use the same as he pleases for any purposes of his own not inconsistent with a similar right in the proprietors of the land above or below, is undoubted; the only

[1] *Maggun Chuckerbutty* v. *Bhoobun Mohun Bhooya*, Cal. S. D. 1857, p. 1324; *Muthoora Mohun Mytee v. Mohendra Nath Pal*, Cal. S. D. 1860, p. 301; *Kena Mahomed* v. *Bohatoo Sircar*, Marsh., 506; *Luchmee Pershad* v. *Fuzelutunnissa*, 7 Suth. W. R. 367; *Bunsee Sahoo* v. *Kulee Pershad*, 13 Suth. W. R. 414; *Chumroo Sing* v. *Mullick Khyrut Ahmed*, 18 Suth. W. R. 525; *Khoorshed Hossein* v. *Tek Narain Sing*, 2 Cal. L. R. 141; *Robinson* v. *Ayya Krishnama*, 7 Mad. H. C. (37) 46; *Rayappan* v. *Viravadhra*, I. L. R. 7 Mad. (530) 534; *Perumal* v. *Ramasami*, I. L. R. 11 Mad. (16) 22.

[2] Cal. S. D. 1857, p. 1324.

question before us, is whether one proprietor can have any right as against another regarding waters previous to their arrival at a defined natural watercourse." After alluding to the absence of any case in point in the reports of their own decisions, the learned Judges quoted a passage from the judgment of Baron Alderson, which I have already cited, and thus continued:—"With this ruling we entirely concur, for it seems to be founded on the acknowledged principle that though a party is not to do anything to injure his neighbour's property, yet he is not restrained from doing any lawful act incident to the enjoyment of his own property. As then we consider that the prevention by defendant of the surface water flowing from his land to plaintiff's, is a legal act, incident to the enjoyment of his own property, we are of opinion that plaintiff can have no action against defendant for the act in question."

The Indian Easements Act, s 7.—Section 7, illustration (g), of the Indian Easements Act (V of 1882), also recognises as a natural right, "the right of every owner of land to collect and dispose within his own limits of all water ..... on its surface which does not pass in a defined channel."

Summary of the doctrines followed in the different states in America.—In America, however, the law upon this point varies in different states. In Mr. Gould's treatise on the Law of Waters, the law of that country has been thus summarised:—

"According to the rule of the Common law, which is accepted in England, Massachusetts, Maine, Vermont, New York, New Hampshire, Rhode Island, New Jersey and Wisconsin, a landowner may appropriate to his own use or expel from his land all mere surface water or superficially percolating waters, in draining his soil for agriculture, in collecting it for domestic purposes, or for the sole purpose of depriving an adjoining owner of it, and any person, from whose land it is withheld or whose water supply is depleted, will, in the absence of an express grant, have no right of action for such diversion or obstruction. In New Hampshire, a landowner may disturb the natural drainage only to the degree necessary in the reasonable use of his own land, and what is such reasonable use is ordinarily for the jury to determine under appropriate instructions.

"By the Civil law, the lower of two adjacent estates owes a servitude to the upper to receive all the natural drainage; and the lower owner cannot reject nor can the upper withhold the supply, although either, for

the sake of improving his land, according to the ordinary modes of good husbandry, may somewhat interfere with the natural flow of the water. Interference with the natural flow of surface water is regarded as a nuisance, for which nominal damages may be recovered without proof of actual damage. The Courts of Pennsylvania, Illinois, North Carolina, California, and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri."[1]

Rights in a natural stream, when it receives a portion of its supply from artificial sources.—The rights of riparian proprietors to the use and to the flow of water of a natural stream, are not in any way altered by the circumstance that the stream receives a portion of its supply from artificial sources. Waters from such sources as soon as they reach the natural stream, become a part of it, and subject to the same natural rights in the riparian proprietors, as those which the law annexes to the water of such a stream, when it is supplied by natural feeders. But such rights do not attach to the waters until they have reached the stream; nor does any obligation arise on the part of the originator of the artificial supply to continue the same.[2]

How far riparian rights may be granted to a non-riparian proprietor.—A question of considerable nicety and difficulty, discussed of late years in some of the English cases, is, whether a riparian proprietor can grant to a non-riparian proprietor a license to exercise any of those rights which are incident only to soil bordering on a stream. Primâ facie, the only conclusion which, apart from other reasons, a consideration of the nature of the real foundation of the riparian rights, namely, the contact of land with the flow of the stream, would warrant, is that such rights cannot be severed from the riparian land, and be assigned independently of it.

Stockport Waterworks Co. v. Potter.—In *Stockport Waterworks Co. v. Potter*,[3] the plaintiff, company, who had bought from a riparian owner certain waterworks, not situated on riparian lands, and also the use of certain tunnels and conduits running from a natural stream through the riparian lands to the waterworks, sued a higher riparian owner for polluting the stream. The majority of the Court of Exchequer, Bramwell, B., dissentiente, decided that such a grant, though it might be valid

[1] Gould on Waters, §§ 265—266.

[2] *Wood v. Waud*, 3 Ex. (748) 749; 18 L. J. Ex. (305) 314.

[3] 3 H. & C 300.

against the grantor, could not confer on the grantee the rights of a riparian owner, so as to entitle him to sue other persons in his own name for infringement of them. They considered that the rights of a riparian owner were so annexed to the soil that they could not be granted away. The reason for the decision of the majority is contained in the following passage in the judgment of Pollock, C. B,—"There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river, the possession of which gives him his water-rights, and at the same time transfer those rights or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant. It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor, and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water-rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is, that he can have them against the grantor, but not so as to sue other persons in his own name for an infringement of them."

Ormerod v. Todmorden Mill Co.—The same view has been maintained in the recent case of *Ormerod* v. *Todmorden Mill Co.*,[1] where the Court of Appeal approved of the decision of the majority in the case I have just cited. There the defendants, who were not riparian owners, had, by means of a pipe laid through the land of a riparian owner, conducted water to their works, and after using it for condensing purposes, returned it to the stream below the point at which it had been taken, in a heated condition, and almost inappreciably diminished in quantity, at a little distance above the estate of the plaintiffs, who were riparian proprietors, and had been in the habit of conducting water from the river to their mill. Upon these facts, Cave, J., held that the plaintiff's rights had been sufficiently infringed and awarded him damages, "on the ground that a riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream, and that any user of the stream by a non-riparian proprietor, even under a grant from a riparian proprietor, is wrongful, if it sensibly

[1] 11 B. D. 155. Cf. *Whaley* v. *Laing*, 2 H & N. 476; 26 L. J. Ex. 327; reversed in error, 3 H. & N. 675; 27 L. J. Ex 422.

affects the flow of the water by the lands of other riparian proprietors." This judgment was upheld in the Court of Appeal. The present Master of the Rolls said:—"I am prepared to say that for the reasons given by Pollock, C. B. and Channell, B., I agree with the judgment of the majority of the Court in *Stockport Waterworks Co.* v. *Potter*:[1] the grant of a right to flowing water by a riparian owner is valid only against himself and cannot confer rights as against others. The law as to flowing water is part of the Common law of England; but it only exists as between riparian owners; it does not extend to those whose lands do not abut on streams and rivers." Bowen, L. J., was of opinion that, "the rights of a riparian proprietor are inseparably attached to the soil."

Opinion of Lord Bramwell.—The opposite view maintained by Lord (then Baron) Bramwell, was supported by him by an argument,[2] which he thus expressed:—"The principle on which it seems to me the plaintiff is entitled to recover is this: as a general rule, when a man has a property, he may grant to others estates in and the rights of enjoyment of it, and the grantees may maintain actions against those who disturb them. A man entitled to land may grant leases, may grant the exclusive herbage, a right of depasturing, a right of way, a right to game. He may grant the mines underneath, or the right to get minerals, and other rights in or over the property, or of enjoyment of it. So, if the land is covered with water, he may grant rights of fishing. And in all these cases the grantee may maintain actions in respect of the rights granted." This reasoning appears to be almost unanswerable; it has not, however, met with the approbation of any of the learned judges who have had occasion to consider it in subsequent cases.

Kensit v. Great Eastern Railway Co.—The qualification, 'if it sensibly affects the flow of the water by the lands of other riparian proprietors' annexed to the latter branch of the proposition laid down in the case to which I have just referred, and which is to the effect that any user by a non-riparian proprietor, even under a grant from a riparian proprietor, is wrongful, is deserving of particular attention and is exemplified in the later case of *Kensit* v. *Great Eastern Railway Co.*[3] There the defendant, railway company, bought from the plaintiff, a riparian owner, a parcel abutting on the stream, and above the parcel

[1] 3 H. & C. 300.

[2] See observations of Bramwell, B., in *Nuttall* v. *Bracewell*, L. R, 2. Ex. 1; 36 L. J. Ex. 1.

[3] 23 Ch. D. 566; (in the Court of Appeal) 27 Ch. D. 122.

left to the plaintiff. An owner of land adjoining this parcel of the defendants, but not abutting on the stream, under a license or grant from the defendants, laid two pipes through their lands, by one of which water was pumped up, and, after being used for cooling or condensing purposes, used to be discharged back into the stream a few feet lower down by the other. The water thus drawn up merely performed a little circuit and came back into the stream undiminished in quantity and uninjured in quality. Upon these facts, the plaintiff who was a lower riparian proprietor, prayed for an injunction to restrain the defendants from allowing the water to be taken through their land, and the licensee from taking the water in this way. It was contended that the attempt to put another person in the position of a riparian proprietor was a wrong, in respect of which the plaintiff was entitled to maintain an action, on the ground that the riparian proprietors are a body who cannot be added to, except by acquisition of a portion of the bank of the river, and an attempt to do it in any other way was therefore wrongful. But Pollock, B., held that the plaintiff could not maintain the action, inasmuch as the acts done by the licensee of the defendants had not sensibly affected the flow of the stream. The Court of Appeal upheld his decision.

Result of the authorities.—The result of these cases seems therefore to be that, a riparian proprietor can sever his riparian rights from his riparian estate and confer them on another who is not a riparian owner by grant or license, and such grant will be valid so long as the grantee or licensee does not transgress the limits (as to the extent of user), within which the riparian proprietor himself was bound to exercise his rights.

Nuttall v. Bracewell.—There is another class of cases in which a riparian proprietor for the purpose of obtaining a greater momentum of fall of the water at his own mill, has, under an agreement with a higher riparian proprietor, constructed a goit or artificial cut on the land of the latter and received a supply of water through it. In *Nuttall* v. *Bracewell*[1], Pollock, C. B., and Channell, B., held that in such a case the diversion of the stream by means of a goit, an open though artificial channel, amounted to a division of the stream into two channels, and that the plaintiff as a riparian owner on the goit, had all the rights which a riparian owner would have had on a natural stream. This reasoning

[1] L. R. 2 Ex. 1; 36 L. J. Ex 1.

seems to be hardly satisfactory, because it involves the position that natural rights can be acquired in an artificial stream, which Lord Justice Cotton, in *Kensit* v. *Great Eastern Railway Co.*,[1] declared to be a contradiction in terms. Martin, B., arrived at the same conclusion upon the ground that the owners of two adjoining closes may agree together for their mutual benefit to take water through a goit from the close of the one into the close of the other, returning the water to the stream in the close of the latter, and thereby doing no injury to any one; 'the law favours the exercise of such a right; it is at once beneficial to the owner and to the commonwealth'. This decision, however, it is conceived, may now be supported on the ground that, as user by the plaintiff was within the strict limits of the rights of his grantor, a riparian proprietor, he must be taken to occupy the same position as a riparian proprietor does, and as such entitled to protect himself against any infringement of his rights by any other riparian proprietor higher up or lower down the stream. There exists no doubt a distinction between the previous cases and the last one, namely, that in the former, the person who claimed to use the water of the stream through a pipe or an artificial cut, was the defendant, whilst in this case he was the plaintiff. But I do not think that this distinction makes any material difference.

Crossley v. Lightowler.—*Crossley* v. *Lightowler*,[2] was a case almost similar in its circumstances with the last one, with this difference only, however, that in the former the injury complained of was pollution of the stream, while in the latter it was excessive abstraction of the water of the stream. But Lord Chelmsford, L. C., arrived at the opposite conclusion, though *Nuttall* v. *Bracewell*[3] had been cited before him in argument. But in *Holker* v. *Porritt*,[4] the rule laid down in *Nuttall* v. *Bracewell*[3] was re-affirmed.

Theory of title by appropriation.—To enable you to gain a clearer insight into the nature of these water-rights, I shall notice briefly the so-called theory of title by appropriation, which has been discussed on several occasions and appears to have prevailed in the earlier decisions of the Courts in England.[5] Water flowing in a stream has sometimes

[1] 27 Ch. D. 122.

[2] L. R. 2 Ch. 478; L. R. 3 Eq. 279

[3] L. R. 2 Ex. 1; 36 L. J. Ex. 1.

[4] L. R. 8. Ex. 107; L. R. 10 Ex. 59.

[5] *Williams* v. *Moreland*, 2 B. & C. 910; 4 Dowl. & R. 583; *Bealy* v. *Shaw*, 6 East, 208; *Saunders* v. *Newman*, 2 B. & Ald. 258; *Cox* v. *Mathews*, 1 Vent., 137; *Liggins* v. *Inge*, 7 Bing. 692; *Frankum* v. *Falmouth*, 6 C. & P. 529.

been said to be publici iuris, and sometimes a bonum vacans, to which the first occupant acquires an exclusive right merely by reason of such prior occupancy; it has been contended that the first person who can get possession of the stream, and apply it to some purposes of utility, has a good title to it against all the world, including the proprietor of the land below, who has no right of action against him, unless he has already applied the stream to some useful purpose also, with which the diversion interferes; and that if he has not done so, the first appropriator may altogether deprive him of the benefit of the water. "If a stream," said Blackstone, "be unoccupied, I may erect a mill thereon, and detain the water, yet not so as to injure my neighbour's prior mill or his meadow, for he hath by the first occupancy acquired a property in the current".[1] This, however, he said, merely in illustration of his theory, that title to things was acquired by occupancy. But, in another portion of his Commentaries, he said:—"There are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences."[2]

This last passage shows that, even according to Blackstone, right by prior occupancy is commensurate with the quantity of water actually appropriated by severance from the stream,[3] and not with the extent of diversion or interruption which the first occupant may have made of the flow of the water; for it is absurd to suppose that the abstraction of a globule of water from a flowing stream to-day can create any right to another globule which may possibly hereafter form a part of the stream, but which is yet on the mountains. However that may be, a uniform course of modern decisions[4], guided indeed by a truer conception of the

[1] 2 Black. Comm. 402.

[2] 2 Black. Comm. 14.

[3] Cf. *Mason* v. *Hill*, 5 B. & Ad. 1; *Embrey* v. *Owen*, 6 Ex. (353) 369; *Lyon* v. *Fishmongers' Co.*, 1 App. Cas p. 683, *per* Lord Selborne.

[4] *Mason* v. *Hill*, 5 B. & Ad. 1; 3 B. & Ad. 1; 2 Nev. & M. 747; *Wright* v. *Howard*, 1 Sim & St., 190; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 611; *Cocker* v. *Cowper*, 5 Tyrw. 103; *Chasemore* v. *Richards*, 2 H. & N. 181; *Holker* v. *Porritt*, L. R. 10 Ex. 59; *Tyler* v. *Wilkinson*, 4 Mason, U. S. R. (Amer.), 397; *Perumal* v. *Ramasami*, I. L R. 11 Mad. 16.

nature of these riparian rights, has fully established the doctrine that prior occupation or appropriation, unless continued adversely for a period of twenty years, confers no right to the use of water in a flowing stream; that this right is inherent in the ownership of the soil bordering upon the stream, and is not founded on user; that it belongs ex iure naturae to every one who owns property on its banks, whether he chooses to use it or not; that as use does not make it, disuse does not destroy or extinguish it; and that the right of each riparian proprietor to the use of the stream being at every moment of time concurrent with, and so far limited by, similar rights of other riparian proprietors on the same stream, it is wholly immaterial who is first in time in the use thereof.

Mason v. Hill.—The leading case upon this topic is that of *Mason* v. *Hill*,[1] where Lord Denman, C. J., in giving judgment, said:—"The position that, the first occupant of running water for a beneficial purpose, has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this as in other cases of injuries to real property, possession is a good title against a wrong-doer; and the owner of the land who applies the stream that runs through it, to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill: *The Earl of Rutland* v. *Bowler*.[2] But it is a very different question, whether he can take away from the owner of the land below, one of its natural advantages which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied, and deprive him of it altogether, by anticipating him in its application to a new purpose. If this be so, a considerable part of the value of an estate which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall, within its limits, might, at any time, be taken away; and, by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another."

Mr. Angell's argument.—Mr. Angell in his treatise on the Law of Watercourses,[3] has put forth a most original argument against the theory of appropriation. "Every riparian proprietor," says the eminent author, "necessarily, and at all times, is using the water running through it,"—

[1] 5 B. & Ad. 1. [2] Palmer, 290. [3] (7 Ed.) § 134.

i. e., the stream—"in so far at least as the water imparts fertility to the land and enhances the value of it. There is therefore, no prior or posterior in the use, for the land of each enjoyed it alike from the origin of the stream".

Whether proof of actual perceptible damage essential to sustain an action.—But though the theory of title by appropriation was thus exploded in *Mason* v. *Hill*,[1] there still lingered for a time in the Courts in England the notion that some act of appropriation or perception by a riparian owner was necessary before he could sue for the infringement or disturbance of his right; or, in other words, proof of actual damage was held essential to entitle him to maintain an action for diversion or abstraction of water from a stream. But in process of time this doctrine also disappeared, and later authorities since have fully settled the rule that such proof of actual damage is wholly unnecessary; that every riparian proprietor along the stream, albeit he has never applied the water to any purposes of utility, has a right to maintain an action against any person for an unreasonable and unauthorised user of the same. In one sense every act of diversion or abstraction of water from a stream by a riparian proprietor to an extent beyond what is incident to a reasonable user thereof, necessarily inflicts a sensible damage on every lower riparian proprietor along the same stream, in so far at least as such act lessens the fertility of his soil and thereby diminishes pro tanto the value of it; but the fact that an unreasonable user of the water by a riparian proprietor, even in the case of a natural stream, if suffered to be enjoyed for a period of twenty years without opposition by the adjacent or opposite riparian proprietors, would by prescription ripen into a title in favour of the former to the use of it, in derogation and possibly in total defeasance of the natural rights of the latter, is a sufficient legal foundation for the maintenance of an action for damages, as well as for injunction[2] to restrain such unreasonable user, without proof of any special damage; though, of course, where the water of the stream has not been appropriated to any beneficial purpose, *e. g.*, by the erection of a mill &c., it is manifest that nominal damages only can be recovered.[3] An act of appropriation does not create

[1] 5 B. & Ad. 1.

[2] In such cases, the injunction is granted to avoid the inconvenience of repeated and successive actions. *Clows* v. *Staffordshire Water Co.*, L. R. 8 Ch. (125) 143; *Pennington* v. *Brinsop Hall Coal Co*, 5 Ch. D. 769.

[3] *Rochdale Canal Co.* v *King*, 2 Sim. N. S. 78; 20 L. J. Ch. 675; *Embrey* v. *Owen*, 6 Ex. (353) 368; 20 L. J. Ex. 212; *Northam* v. *Hurley*, 1 E. & B. 665; *Wood* v *Waud*, 3 Ex. 748; 18

a right to sue for the wrongful application of the water of the stream by another, but simply measures the quantum of damages to which the appropriator may be entitled.

Whether apprehension of possible damage necessary.—But the rule just stated must not be understood to imply that every riparian proprietor on the stream, however remote his riparian estate may lie from the spot where the unreasonable user takes place, whether above or below it, is entitled to maintain an action to restrain such user. Abstraction or diversion of water, or the interruption or alteration of its flow, or the corruption of its quality by one riparian proprietor, or even by a non-riparian proprietor with his license, cannot possibly inflict any sensible injury on another riparian proprietor situated, say, twenty miles below the stream, so as to afford him any ground of complaint. But though actual perceptible damage may not be, yet reasonable apprehension of possible damage even at a future time, is, according to the latest authorities, essential to sustain such an action.[1]

A correct knowledge of the law concerning water flowing over the surface in a defined natural channel requires that we should have some acquaintance with the leading principles of the law which relates to (i) water flowing over the surface, but not in a defined channel, or to (ii) subterranean water, which either flows in a known and defined stream, or (iii) percolates through the strata of the earth without any known and defined course.

A minute and detailed examination of the various points which might arise out of the mutual rights and liabilities of adjoining landowners in connection with such water, is not only attended with extreme

L J. Ex. 305; *Sampson* v. *Hoddinott*, 1 C. B. N. S. p. 611; 26 L. J. C. P. p. 150; *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J. Ex. 81; 5 Jur. N. S. 873, *per* Lord Wensleydale; *Harrop* v. *Hirst*, L. R. 4 Ex. (43) 45; *Medway* v. *Romney*, 9 C. B. N. S. 575; *Crossley* v. *Lightowler* L. R. 3 Eq (279) 296; L. R. 2 Ch, p. 483; *Bickett* v. *Morris*, L. R. 1 H L. (Sc. App.), 47, *per* Lord Westbury; *Swindon Waterworks Co.*, v. *Wilts & Berks Canal Navigation Co.*, L. R. 7 H. L. (697) 705; L. R. 9 Ch. 451; *Pennington* v. *Brinsop Hall Coal Co*, 5 Ch. D. 769; *Frechette* v *La Compagnie Manufacturière de St Hyacinthe*, 9 App. Cas. 170; Angell on Watercourses, (7th ed) §§ 427-432, 449; *Ram Chand Chuckerbutty* v. *Nuddiar Chand Ghose*, 23 Suth. W. R. 230; *Subramaniya Ayyar* v. *Ram Chundra Rau*, I. L. R. 1 Mad. 335; *Kali Kissen Tagore* v. *Jodoo Lal Mullick*, L. R. 6 Ind. App. 190; 5 Cal. L. R. 97. Contra, *Shama Churn Chatterjea* v. *Boidya Nath Banerjea*, 11 Suth. W. R 2; *Amatool Russool* v. *Jhoomuch Sing*, 24 Suth. W. R. 345; *Ponnu Sawmi Tevar* v. *Collector of Madura*, 5 Mad. H. C. R. 6.

[1] *Cooper* v. *Crabtree*, 20 Ch. D. 539; *Kensit* v. *Great Eastern Railway*, 27 Ch. D. 122; *Orr Ewing* v. *Colquhoun*, 2 App. Cas. (839) 853-854, *per* Lord Blackburn.

difficulty, but would also take us very much beyond the scope of this lecture.

Rights and obligations of adjoining landowners with respect to surface drainage.—I have already said with regard to water passing over the surface without any defined channel that, the person in whose land such water rises, or upon whose land it falls, has, according to English law, (followed in this respect by judicial decisions and legislation in India), complete dominion over it, and may dispose of it in any way he chooses, even though such water, unless so disposed of by him, might have flowed beyond his boundary in a defined natural stream.[1] From this principle of law, it follows a fortiori that, his dominion over it must be equally complete, when it passes beyond his limits over the land of the adjoining neighbour situated below him, as a continuation of the same surface drainage and without any defined natural channel; and the owner of the lower land has no right to compel his upper neighbour to transmit to him the discharge of the surface water.

It follows further from the same principle that, after such surface water has arrived within the limits of the lower proprietor, he has the same free and unfettered control over it as the proprietor of the higher land in which such water originated or on which it fell; and he is as absolutely free from any obligation to transmit surface water to the proprietor next below him, as the person in whose land the water was first found was, to send on the water to the adjoining landowner below himself.

Whether a proprietor of lower land has any right to prevent the flow of surface drainage from land higher above.—Now, if the lower proprietor has no right to compel the upper proprietor to continue the discharge of the surface drainage over his land, even when such discharge is a benefit and an advantage to him, the question arises—Has he a right to prevent such surface drainage from flowing on to his land from the land of the proprietor above, when it is a nuisance to him? Has he a right to erect a barrier on his land or change the level of his own soil, so as to prevent the flow of the water upon his land or set it back upon the land of the adjoining proprietor above him?

[1] *Supra*, 295—298. The terms in which this doctrine has been stated in the English cases, would seem to restrict the exercise of this right merely to purposes of agriculture and improvement of land, but the Indian Easements Act (V of 1882), s. 7, illus. (*g*) enacts the rule without any such qualification.

American law.- Upon this point the Courts in America have arrived at conclusions which are diametrically opposed to one another. Some states have answered the question in the affirmative and some in the negative.[1]

Roman law.—The Roman law, however, answered this question in the negative. "It should be known" said Ulpian, "that the superior (owner) can claim this action (actio pluviae arcendae) against the inferior, if he by means of any artificial work prevents the water (namely, either rain water or the overflowings of a river) from naturally flowing down to his land; and the inferior owner (can claim the same action) against the superior, if he alters the natural flow of the water.[2]

French law.—The law of France adopting this rule of the Roman law has laid down that:—

"Inferior lands are subjected, as regards those which lie higher, to receive the waters which flow naturally therefrom to which the hand of man has not contributed.

"The proprietor of the lower ground cannot raise a bank which shall prevent such flowing.

"The superior proprietor of the higher lands cannot do anything to increase the servitude of the lower."[3]

English law.—In England there does not appear to be any case in the books, in which this point has of late years been directly raised and discussed, though no doubt, there are dicta of eminent judges to be found in some cases, which substantially coincide with the rule of the Civil law. In *Scots Mines Co.* v. *Lead Hills Mines Co.*[4] Lord Campbell is reported to have said:—"Without any convention, the occupier of a lower field holds it under the servitude of receiving the natural drainage from an adjoining field on a higher level."

Anglo-Indian law.—But in India, a uniform course of decisions guided

[1] Angell on Watercourses, (7th ed.) §§ 108a—108h; Gould on Waters §§ 275-276.

[2] Item sciendum est, hanc actionem vel superiori adversus inferiorem competere, ne aquam, quæ natura fluat, opere facto inhibeat per suum agrum decurrere: et inferiori adversus superiorem, ne aliter aquam mittat, quam fluere natura solet. Dig. xxxix. 3. 1. 13, (Ulpian).

Tria sunt, per quae, fundus inferior superiori servit: lex, natura loci, consuetudo quae pro lege semper accipitur. (Gothofred).

Aquam pluviam dicimus, quæ de coelo cadit atque imbre excrescit. Dig xxxix. 3. 1. pr., (Ulpian).

[3] 3 Code Civil, § 640.

[4] 34 L. T. 34. Cf. *Smith* v. *Kenrick*, 7 C. B. (515) 566; 18 L. J. C. P. 172.

apparently by the doctrine of the Civil law, has, from an early date, established the rule that the proprietor of land on a higher level has a natural right incident to the ownership of such soil, that the surface drainage of his land (whether it arises from a spring or from rainfall or from flood, the waters from which sources have either originated in or fallen on or come to such land directly or have passed on to it from other land situated on a still higher level[1]) shall be received by the proprietor of the land below,[2] though, no doubt, it has been laid down at the same time that this duty on the part of the lower proprietor, or this 'servitude,' as it is called, which the lower land owes to the adjoining higher land, does not extend so far as to compel him to keep his land in a marshy state, but that it is fulfilled if he merely provides a passage for such water over his land.[3]

The Indian Easements Act (V of 1882) S. 7. illus. (i) has adopted the rule laid down in the above decisions.

Extent of the right of the proprietor of higher land to discharge surface drainage.—This right of the proprietor of the upper land does not extend to the discharge of surface water from his own land over that of his neighbour by collecting it into drains or culverts or artificial channels.[4] But it has been held in America that, although the obligation of the lower proprietor to receive surface waters applies only to waters which flow naturally without any act of man, it is not to be understood therefore that the upper proprietor is not permitted to do anything on his own land; that the law only intends that he should not discharge upon

[1] *Hameedoonnissa* v. *Anund Moyee Dasi*, Suth. W. R. (F. B. No.) 25. In this case, the Calcutta High Court decided that the proprietor of a lower land obstructing the flow of surface drainage from the land of a proprietor above him, is not liable, in the absence of proof of substantial damage; it further held that, if the higher land be in the occupation of ryots, the landlord is competent to maintain a suit for damages, and that the measure of such damages is the loss of rent which the landlord is likely to suffer from the destruction or deterioration of the crops caused by the obstruction of water. Cf. *Ram Chandra Jana* v. *Jibun Chandra Jana*, 1 B. L. R. (A. C.) 203.

[2] *Muthoora Mohun Mytee* v. *Mohendra Nath Pal*, Cal. S. D, 1860, pt. II, 301; *Hameedunnissa* v. *Anund Moyee Dasi*, Suth. W. R. (F. B. No.) 25; *Khettur Nath Ghose* v. *Prosunno Ghose Gowala*, 7 Suth. W. R. 498; *Kopil Pooree* v. *Manik Sahoo*, 20 Suth. W R. 287; *Subramaniya Ayyar* v *Rama Chandra Rau*, I. L. R. 1 Mad. 335; *Khoorshed Hossein* v. *Teknaran Sing*, 2 Cal. L. R. 141; *Imam Ali* v. *Pores Mundul*, I. L. R. 8 Cal. 468; 10 Cal. L. R. 396; *Abdul Hakim* v. *Gonesh Dutt*, I. L. R 12 Cal. 323. Cf. *Robinson* v. *Ayya Krishnama Chariyar*, 7 Mad. H. C. 37.

[3] *Kopil Pooree* v. *Manik Sahoo*, 20 Suth. W. R. 287.

[4] Angell on Watercourses (7th ed.) § 271.

the lower land water which would never have fallen there by the disposition of the places alone. In *Kauffman* v. *Griesemer*[1], Woodward J., after having cited some cases, said:—"These cases recognise the principle that the superior owner may improve his lands by throwing increased waters upon his inferior through the natural and customary channels, which is a most important principle in respect not only to agricultural, but to mining operations also. It is not more agreeable to the laws of nature that water should descend, than it is that lands should be farmed and mined; but in many cases they cannot be, if an increased volume of water may not be discharged through natural channels and outlets. The principle, therefore, is to be maintained; but it should be prudently applied."

Argument in support of a right to a reasonable user.—In *Basset* v. *Salisbury Manufacturing Co*[2] it was held that, if the owners of a dam erected in a watercourse, obstruct by means of their dam the natural drainage from the land of another, even when the latter does not happen to be a riparian proprietor, and thereby cause actual damage, they become liable to him therefor, unless such obstruction was caused by them in the reasonable use of their own land or privilege. Bartlett, J., very forcibly states the argument in support of this doctrine of reasonable user, in the following terms:—"If A has the absolute and unqualified right to receive from and discharge into the adjoining land of B, all the drainage and percolation as they naturally flow between that land and his own, this is substantially a right to the use of B's land, practically depriving the latter of all beneficial enjoyment of his property, and in effect amounting to an appropriation of it; and as B and the other neighbouring landowners must have similar rights, the improvement or beneficial occupation of land becomes in fact impossible, and property in the soil for nearly all useful purposes is annihilated. But we do not think it follows from this, as some recent cases have held, that a landowner has the full and unlimited ownership, and the absolute and unqualified right of control, of all water in and upon his land not gathered into natural watercourses; for the non-existence of an absolute right, does not conclusively disprove the existence of a qualified right."—"As in these cases of the watercourse, so in the drainage, a man may exercise his own right on his own land as he pleases, provided he does not interfere with

[1] 26 Penn. St. (Amer.) 407, cited in Angell on Watercourses (7th ed.), 108 e.

[2] 43 N. H. (Amer.) 569, cited in Angell on Watercourses, §§ 108s, note.

the rights of others. The rights are correlative, and, from the necessity of the case, the right of each is only to a reasonable user or management, and whatever exercise of one's right or use of one's privilege, in such case is, such a reasonable user or management is not an infringement of the rights of others; but any interference by one landowner with the natural drainage, injurious to the land of another, and not reasonable, is unjustifiable."

Doctrine of reasonable user not countenanced in England.—But this doctrine of reasonable user has not been applied under similar circumstances by the Courts in England. As regards the right of a landowner to deal with surface drainage, he appears under the Common law of England to be placed under a stricter responsibility than that to which he is subject according to the law in America.

Liability of the proprietor of higher land when the surface drainage, in consequence of change of level of that land, causes damage to the proprietor below—If a person, by deposit of earth or other material, raises the level of his land, and causes the rainfall on its surface to descend on the land of his adjoining neighbour (into which, but for the alteration in the level, such water would not have passed), and thereby occasions substantial damage to him, then according to the decision of the Court of Appeal in *Hurdman* v. *North Eastern Railway*,[1] the person causing damage by such artificial disposition of his land, commits a wrong, for which he is liable to an action at the instance of the party injured. Cotton, L. J., in delivering the judgment of the Court distinguished *Wilson* v. *Waddell*,[2] as applying to damage resulting from surface water in the natural use of land, *e. g.*, the mining of minerals, and said that "if any one by artificial erection on his own land, causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured."

Rights and obligations of landowners with regard to water running in subterranean streams.—The principles of law which govern subterranean water, when it flows in a known and defined stream, are precisely the same as those which govern water flowing over the surface of the earth in a visible and defined natural channel. Law creates correlative

[1] 3 C. P. D. 168. Cf. *Broder* v. *Saillard*, 2 Ch. D. 692.

[2] 2 App. Cas 95.

rights and obligations between adjoining landowners with regard to running water as soon as it is gathered into a stream notorious and well-defined, whether it passes over the surface, or pursues its course through the bowels, of the earth. "In limestone regions," says Lewis, C. J., in *Wheatly* v. *Baugh*[1] "streams of great volume and power pursue their subterranean courses for great distances and then emerge from their caverns, furnishing power for machinery of every description, or supplying towns and settlements with water for all the purposes of life. To say that these streams might be diverted or obstructed, merely because they run through subterranean channels, is to forget the rights and duties of man in relation to flowing water. But to entitle a stream to the consideration of law, it is certainly necessary that it be a watercourse in the proper sense of the term." "If the channel or course," said Pollock, C. B. in *Dudden* v. *Guardians of Clutton Union*,[2] "is known, as in the case of the river Mole,[3] it cannot be interfered with."

Dickinson v. Grand Junction Canal Co.—The question whether the water of a subterranean stream may be diverted or intercepted by the owner of the land above, through which it flows, to the prejudice of the owner below in whose land it issues in the form of a spring, or over whose land it flows in a distinct channel, directly arose in *Dickinson and another* v. *Grand Junction Canal Co.*[4], which, though commented upon and disapproved of in subsequent cases, in so far as it undertakes to decide concerning water percolating through the earth, remains unshaken and has indeed been accepted as sound authority, as regards the law enounced therein with respect to water flowing in defined channels under the surface. In that case, a mill belonging to the plaintiffs was worked by the water of a river, which was supplied by a subterranean stream, as well as by water percolating underground through an intervening strata of chalk. The defendant, canal company, by digging a well at the summit level of their canal, and pumping up water from it by means of pumps and steam engines, to supply their canal, intercepted both species of underground water, which would otherwise have flowed and percolated into the river, thereby preventing the plaintiffs from

[1] 25 Penn. St. (Amer.) 528, cited in Angell on Watercourses (7th ed.) § 112a.

[2] 1 H. & N. 627.

[3] The stream of Ingleborough affords another instance. Phear on Rights of Water, 33.

[4] 7 Ex. 282; 21 L. J. Ex. 241; *Wood* v. *Waud*, 3 Ex 748; 18 L. J. Ex. 305; *per* Lord Wensleydale in *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J. Ex. 81; 5 Jur. N. S. 73.

working their mill as effectually as they had been done before. The Court of Exchequer held that the abstraction of such underground water by the digging of a well was clearly a diversion for which an action would lie at Common law for the injury done to the plaintiffs. That portion of the judgment which deals with subterranean percolation, and holds that an interference with it is actionable, must no doubt, since the decision of the House of Lords in *Chasemore* v. *Richards*,[1] to which I shall have occasion presently to call your attention, be taken to have been overruled.

Extent of the rights of landowners with regard to the use of the water of subterranean streams.—The same reasons, which have led to the assimilation of the law of subterranean streams to the law respecting superficial watercourses, also require that the same rule of 'reasonable user' which applies between riparian owners in the latter case, should determine the extent to which each landowner, through whose land such subterranean stream passes, is entitled to participate in its water.

Right and obligations of landowners with regard to subterranean percolations.—On the other hand, subterranean waters not flowing in a defined stream but merely oozing, filtrating and percolating through the pores and interstices of the earth, are governed by entirely different legal principles. The existence, origin, movement, and course of such waters, are so secret, changeable and uncertain, that it is extremely difficult, if not impossible, to construct in respect of them any definite system of legal rights and liabilities. It is as difficult to measure the precise orbit of the right of each landowner with respect to such percolations, as it is to ascertain the fact, or the extent of, its violation in each individual case. Moreover, even if the difficulty of defining the mutual rights and liabilities of landowners with respect to such waters, were surmountable, the recognition of them would materially interfere with drainage and agriculture, mining and building, and various other works of utility. These and other considerations of a like nature have induced Courts of Justice to place subterranean percolations, for legal purposes, in the same category as the metallic oxides of which the earth is composed, and thus to apply to them the same principle which gives to the owner of the soil all that lies beneath its surface, whether it is solid rock or porous ground or venous earth, or part soil, part water: Cujus est solum ejus est usque ad coelum et ad inferos.

[1] 7 H. L. C. 349; 29 L J. Ex 81; 5 Jur. N. S. 873. Cf. *New River Co.* v. *Johnson*, 2 El. & El. 435; 29 L. J. M. C. 93; 6 Jur. N. S. 374, *per* Crompton, J.,

Acton v. Blundell.—In *Acton* v. *Blundell*,[1] the plaintiff's mill was worked by water raised from a well excavated by him on his land within twenty years before the action. At a distance of half a mile from this well, the defendant sunk a deep pit in his own land for mining purposes and kept it dry by pumping in the usual way. The consequence of this was, that underground water was intercepted and prevented from percolating into the plaintiff's well; and in addition to this, water which had already percolated into the well was abstracted or withdrawn from it. The Court of Exchequer Chamber held that, the loss which the plaintiff had suffered was damnum absque injuriâ, and that he had no cause of action. The judgment of the Court was delivered by Chief Justice Tindal, and it is so instructive that I shall read portions of it to you.

"In the case," said his Lordship, "of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of a neighbouring proprietor, but through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time; it may well be that it is only yesterday's date that they first took the course and direction which enabled them to supply the well; again, no proprietor knows what portion of water is taken from beneath his own soil; how much he gives originally, or how much he transmits only; or how much he receives; on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said with reference to the well, to be any flow of water at all."—"If the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power still further of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil."—"The advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking-place for cattle,

[1] 12 M. & W. 324; 13 L. J. Ex. 289. This case has been approved of in several cases: see *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J. Ex. 81; 5 Jur. N. S. 873; *New River Co.* v. *Johnson*, 2 El. & El. (435) 444; *Humphries* v. *Brogden*, 12 Q. B. 753; *Smith* v. *Kenrick*, 7 C. B. 540; *Reg.* v. *Metropolitan Board of Works*, 3 B. & S. (710) 727; *Ballacorkish Silver Lead & Copper Mining Co.* v. *Harrison*, L R. 5 P. C. 49.

whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined."

The above case decided, that a landowner by sinking a shaft in his own land may lawfully (i) intercept subterranean water and prevent it from percolating into the well of another landowner, or (ii) abstract or withdraw water which had already percolated in his well.

Chasemore v. Richards.—The first proposition was subsequently re-enunciated in the leading case of *Chasemore* v. *Richards*,[1] in which the judgment of Tindal, C. J., in *Acton* v. *Blundell*,[2] was fully approved by the House of Lords. In this case, the defendants sunk a deep well in their land, and pumped up large quantities of water from it for the supply of a town, many of its inhabitants having no title as landowners. In consequence of this operation, underground water was intercepted and prevented from percolating through the strata and feeding a river, the water of which had for more than sixty years turned plaintiff's mill. It was contended on behalf of the plaintiff that, even granting that the defendant had a right to dig a well and appropriate the water for the use of his own property, yet his right did not extend to such an unreasonable user of it, as would justify his abstraction of water for the use of persons unconnected with his estates. This argument found favour with Lord Wensleydale, but the other noble and learned Lords, Lords Chelmsford, Cranworth, Kingsdown and Brougham, held that the plaintiff had no right of action. Lord Chelmsford said:—"But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of land, through which the water filters, cannot intercept it in its progress, can he prevent its descending to the earth at all, by catching it in tanks or cisterns? And how far will the right to this water supply extend? In this case the water, which ultimately finds its way to the river Wandle, is strained through the soil of several thousand acres—Are the most distant landowners, as well as the adjacent ones, to be bound at their peril to take care to use their lands so as not to interrupt the oozing of the water through

[1] 7 H. L. C. 349; 29 L. J. Ex. 81; 5 Jur. N. S. 873.
[2] 12 M. & W. 324; 13 L. J. Ex. 289.

the soil, to a greater extent than shall be necessary for their own actual wants?"

You will have observed that this case went a step further than *Acton* v. *Blundell*[1] had done in this direction. The fact that the plaintiff's well had been worked for more than sixty years, and that the defendants abstracted water for purposes wholly unconnected with the use of their land was treated in this case as altogether immaterial.

New River Co. v. Johnson.—The second proposition was re-affirmed in *New River Co.* v. *Johnson*,[2] where the waters which had already percolated into the well of the respondent, was drained by a sewer constructed by the appellants under statutory powers. The Court of Queen's Bench held that, as the damage was not actionable, respondent had no right to compensation.

Ballacorkish Silver Lead and Copper Mining Co. v. Harrison.—The rule of law regarding subterranean percolations laid down in the above cases, as between owners of properties adjoining one another longitudinally on the earth's surface, was, in the case of *Ballacorkish Silver Lead & Copper Mining Co.* v. *Harrison*,[3] applied by the Privy Council as between owners of properties contiguous to one another vertically. Their Lordships, having arrived at the conclusion that the two cases were substantially identical, and that the same law must govern both, held that a landowner who had granted the surface to another retaining the mines underneath, was, in the absence of an express agreement, not responsible to the grantee, if in working the mines he drained the water from the surface springs.

"To hold otherwise" said Lord Penzance, delivering the judgment of the Board, "might not improbably result in rendering the reservation of mines wholly useless. Percolation of water into mines to some extent is an almost necessary incident of mining. And if the grant of the surface carries with it a right to be protected from any loss of surface water by this percolation, the owner of the surface would hold the owner of the mines at his mercy, for he would be entitled by injunction to inhibit the working of the mines at all."

Grand Junction Canal Co. v. Shugar.—But in *Grand Junction*

[1] 12 M. & W. 324; 13 L. J. Ex. 289.

[2] 2 El. & El. 435. Cf. *Reg.* v. *Metropolitan Board of Works*, 3 B. & S. 710; 9 Jur. N. S. 1008; 32 L. J. Q. B. 105.

[3] L R. 5 P. C. 49.

Canal Co. v. *Shugar*,[1] the above rule was held not applicable, where the proximate result of the abstraction of subterranean percolations was to sensibly diminish the supply of water in a natural watercourse, flowing over the surface of the adjoining land in a clear and defined channel. "You are not," said Lord Hatherley, L. C., "by your operations, or by any act of yours, to diminish the water which runs in this defined channel; because that is not only for yourself, but for your neighbours also, who have a clear right to use it, and have it come to them unimpaired in quality and undiminished in quantity."

Roman and Scottish law.—The rule of English law with regard to subterranean percolations is in accordance with the doctrine of the Civil Law which laid down that if a man dug a well in his own field, and thereby drained his neighbour's, he was not responsible to him; but then this rule was subject to the important qualification, namely, si non animo vicino nocendi sed suum agrum meliorem faciendi id fecit,[2] that is, if he did so with the object of improving his own field and not injuring his neighbour's.

And this view is followed by recognised authorities in the law of Scotland, who say that an owner using his own land must act 'not in mere spite or malice, in æmulationem vicini."[3]

Whether, according to English law, presence of malice creates any responsibility in the person intercepting subterranean percolation.—How far the presence of unmixed malice, which, it must be admitted, is always extremely difficult, if not impossible to prove, would affect the application of the rule, has not been directly discussed, far less authoritatively decided, in any case in England. In *Rawstron* v. *Taylor*,[4] which declared the unqualified right of a person to drain the surface water found on his land, even to the prejudice of his neighbour, Baron Martin was of opinion that the existence of malice was wholly immaterial. "The proprietor of the soil," said his Lordship, "has, primâ facie, the right to drain his land; and, unless there is some express authority to show that his motive in so doing affects the question, in my opinion the motive is altogether immaterial."

American view.—The point, however, has been discussed in several cases by the Courts in America; but, as might have been expected from the nature of the difficulties attending the solution of the question, not

[1] L. R. 6 Ch. 483.

[2] Dig. xxxix. 3. 1. 12.

[3] Bell's Principles of the Law of Scotland, § 966.

[4] 11 Ex. 369; 25 L. J. Ex. 33.

with any very satisfactory result. It is not easy to fix with precise certainty the direction in which the balance of judicial opinion in that country lies, but the assertion may be hazarded that there is a growing tendency to treat the presence of malicious motives as devoid of any real significance.

Discussion of the point.—The motives which impel a man to do a particular act may be infinite. Where the desire to cause mischief to the property of a neighbour by the interception or abstraction of percolating water, combines with a desire to effect improvements on one's own property, however reprehensible such a desire may be as a matter of conscience, in law, it ought to be a matter of absolute indifference. The legitimate portion of the desires, which in this particular instance are present in his mind, may be quite adequate to produce the contemplated result, which in itself is lawful. To say that even in such a case his conduct begets a legal responsibility is to confound the respective provinces of jurisprudence and morality. But where such act is the immediate outcome of utter malevolence, as for instance, when a person digs a well and continually pumps up percolating water through it, and disposes of it in such a way as unmistakeably to show that he is doing it not for any benefit to himself, but simply to deprive his neighbour of the use of the water of a spring fed by such underground percolations, the question assumes a rather difficult aspect. It is easy to prophesy that the recognition of a legal responsibility in such a case will tend to promote vexatious litigation, an evil which on the whole is scarcely less serious than that of allowing losses arising from such unneighbourly conduct (by no means frequent), to go without reparation.

Pollution of surface drainage and subterranean percolation.—Although a landowner has an unqualified right to dispose of in any way he chooses, surface water found on his land, or subterranean percolations passing through it, yet if he corrupts or pollutes such water to the injury of his neighbour, he commits a wrong which may be vindicated in damages and may also be restrained by an injunction.

This is laid down by Act V of 1882, and is also the law in England and America.

Hodgkinson v. Ennor.—In the case of *Hodgkinson* v. *Ennor*,[1] it was urged that the principle of law relating to diversion or obstruction of underground water flowing in unknown and undefined streams, established

[1] 4 B. & S. 229; 32 L. J. Q B. 31.

in the case of *Chasemore* v. *Richards*[1], applied equally to pollution of such water, and that therefore no action would lie for injury to a landowner by the pollution of percolating water, as by washing of lead on his land in the ordinary way. But the Court held that, though the person polluting the water might have a right to use it by washing lead, yet he could not so use it as to cause an injury and a nuisance to his neighbour.

Ballard v. Tomlinson.—In *Ballard* v. *Tomlinson*,[2] the plaintiff and the defendant, who were adjoining landowners, had each a deep well on his own land, the plaintiff's land being at a lower level than that of the defendant's. The defendant turned sewage from his house into his well, and thus polluted the water that percolated underground from the defendant's to the plaintiff's land, and through it into his well. The plaintiff drew water from his well by means of a pump, and the water was found adulterated with sewage. It was argued that but for pumping, the polluted water in the defendant's well would not have percolated at all into the plaintiff's; but the Court of Appeal held that that made no difference in the liability.

The reason why the interception or diversion of water not running in a defined stream, whether above or below the surface, is not an injury to those persons over or through whose land such water, unless intercepted or diverted, would have passed by gravitation, and the reason why the pollution of such water is an injury to those persons over or through whose land such polluted water passes, has been said to be that in the former case the interception or diversion, when done in a reasonable manner, being an act done within the limits of the land of the person who does it, is perfectly legal, even though it has the effect of depriving the adjacent owner of the water which would otherwise have passed to him, but to which until it had so passed he had no right, by reason of the water not running in a defined channel; whilst in the latter case, the polluted water gets on to the land of the adjacent owner and a nuisance is committed there, precisely in the same way as if a basket of rubbish had been taken and emptied on his land.

[1] 7 H. L. C. 349; 29 L. J. Ex. 81; 5 Jur. N. S. 873. [2] 29 Ch. D. 115.

LECTURE XII.

RIPARIAN RIGHTS.—(*Continued.*)

Easements in natural streams—Acquisition of such easements by grant—How easements for a limited period or on condition may be acquired—Acquisition of easements by prescription—Extent of easements acquired by prescription—Acquisition of a prescriptive right to pollute the water of a natural stream—Right to obstruct the water of a public navigable stream—Whether a right to have water diverted by another may be acquired by prescription—Easement in respect of surface drainage—Easement in respect of subterranean percolation—Artificial streams—Ownership of artificial streams—Acquisition of right in artificial streams by grant—By prescription—Acquisition of such right as against the originator of the stream—Temporary artificial streams—*Arkwright* v. *Gell*—*Wood* v. *Waud*—*Greatrex* v. *Hayward*—Permanent artificial streams—*Holker* v. *Porritt*—*Roberts* v. *Richards*—*Rameshur Pershad Narain Sing* v. *Koonj Behary Pattuk*—*Rayappan* v. *Virabhadra*—Right in artificial streams on severance of estates—The Indian Easements Act, s. 13.—Discussion of authorities—Right to scour or repair the channel of an artificial stream—Extinction of easements—By unity of absolute ownership—By alterations in the dominant tenement—By efflux of time or fulfilment of condition—By express release—By abandonment.

V. Right to erect defences against the encroachment or the flood of the river—Extent of the right in case of ordinary floods—Extent of the right in case of extraordinary floods—Alteration of the natural condition of frontage by riparian or littoral owners—How an obligation to maintain and repair an embankment may be imposed on a frontager—*Hudson* v. *Tabor*—*Nuffer Chunder Bhutto* v. *Jotendro Mohun Tagore*—Extent of such obligation in case of ordinary and extraordinary floods respectively.

In this lecture I propose in the first place briefly to touch upon a few topics relating to easements in natural streams, then to consider the principles which govern the rights and duties of landowners with respect to artificial streams, and finally to deal with the last head of riparian rights, namely, the right of riparian proprietors to erect defences against the encroachment or the flood of the river.

Easements in natural streams.—The natural rights of a riparian proprietor to the use, purity and flow of water in a well-defined natural stream, whether superficial or subterranean, which we have discussed at length in the two preceding lectures, are liable to be enlarged, modified or abridged by grant,[1] covenant (express or implied), prescription[2] or

[1] *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; 26 L. J. C. P. 148; *Embrey* v. *Owen*, 6 Ex. 353; 20 L. J. Ex. 212; *Howard* v. *Wright*, 1 Sim. & St. 190; *Bealy* v. *Shaw*, 6 East, 209; *Balston* v. *Bensted*, 1 Camp. 463; *Gour Sahoy Sing* v. *Sheo Sahoy Sing*, 15 Suth. W. R. 94.

[2] *Ibid*; *Heeranund Sahoo* v. *Khubeerunnissa*, 15 Suth. W. R. 516; *Chumroo Sing* v. *Mullick*

statute.[1] An enlargement or modification of these natural rights in one or more of the riparian proprietors on any natural stream, generally, if not always, synchronizes with an abridgment or modification of such natural rights in one or more of the other riparian proprietors on the same stream; and when an enlarged or modified right to the use, purity and flow of any stream is acquired by any riparian proprietor in any of these modes, abridging or modifyng the natural rights of one or more of the other riparian proprietors on the same stream, it is called an easement.[2]

Acquisition of such easements by grant.—In England, a right to an easement can be created only by a deed.[3] In this country, there is indeed no positive enactment forbidding the creation of an easement by parol,[4] but the use of the expression 'intangible thing,' in the second paragraph of section 54 of the Transfer of Property Act (IV of 1882), renders it probable that since that Act has come into force, an easement cannot be transferred, and presumably therefore cannot be created, without a registered instrument.

When these water-rights are acquired under a grant or covenant, their extent must be determined by the terms of the instrument by which they are created, considered by the light of the surrounding circumstances with reference to which they had been used.[5]

How easements for a limited period or on condition may be acquired.—Under a grant (or covenant) an easement may be acquired either permanently or for a limited period, or until the happening of a certain specified event; for instance, a right to divert water from a stream to a mill for ninety-nine years,[6] either during the whole day or between certain hours,[7] may be acquired under a grant. But no such limited right can be acquired by prescription.[8] Acquisition of an easement for a

Khyrut Ahmed, 18 Suth. W. R. 525; *Rayappan* v. *Virabhadra*, I. L. R. 7 Mad. 530; *Perumal* v. *Ramasami*, I. L. R. 11 Mad. 16.

1 *Mason* v. *Shrewsbury Railway Co.*, L. R. 6 Q. B. 537.

2 Angell on Watercourses (7th ed.), §§ 219a—219c.

3 Goddard on Easements (3rd ed.), 116.

4 *Krishna* v. *Rayappa*, 4 Mad. H. C. 98.

5 *Lord* v. *Commissioners of Sydney*, 12 Moo. P. C. C 496; *Taylor* v. *St. Helens*, 6 Ch. D. 264; *Wood* v. *Saunders*, 44 L. J. Ch. 514; Angell on Watercourses (7th ed.), § 148.

6 *Davis* v. *Morgan*, 4 B. & C. 8; Goddard on Easements (3rd ed.), 126; *Kristna Ayyan* v. *Vencata Chella Mudali*, 7 Mad. H. C., (60) 64.

7 The Indian Easements Act (V of 1882), s. 6.

8 *Ibid.*, s. 15, expl. 1.

limited period is, in fact, inconsistent with the essential nature of prescription, whether statutory or otherwise, which, after enjoyment for a period, more or less definite, and subject to certain conditions recognised by the law, creates an absolute right to such easement, founded, in truth, upon a presumption of its antecedent immemorial existence which, unless abandoned or otherwise extinguished, must, upon general principles of the law, endure for ever.

Acquisition of easements by prescription.—Easements in water may also, as I have said, be acquired by prescription; and this again is of two kinds: (*a*) prescription at Common law, and (*b*) prescription under the statute. There can, of course, be no such thing as prescription at Common law in this country, regard being had to the peculiar signification which attaches to that expression in English law. But we have instead the presumption of a grant or of some other legal origin from long continued and peaceable enjoyment of an easement as of right.[1]

As regards prescription under the statute, the 2nd section of the English Prescription Act (2 & 3 Will. IV. c. 71), and the 26th Section of the Indian Limitation Act (XV of 1877), which corresponds to section 27, Act IX of 1871, expressly provide that easements may be acquired in respect of 'any watercourse or the use of any water,' if the conditions mentioned in those sections are fulfilled. Section 15 of the Indian Easements Act (V of 1882) does not mention these easements specifically, but includes them under the generic term 'easement.' It has been held upon the English Prescription Act,[2] as well as upon the 27th section of Act IX of 1871,[3] which has since been superseded by, though substantially reproduced in its original form in, the 26th section of the Indian Limitation Act, XV of 1877, that provisions contained in them are merely remedial and have been enacted for the purpose of facilitating the establishment of rights of easements; that they are not exhaustive, and do not preclude the acquisition of easements by prescription at Common law, in England,—and by the presumption of an antecedent grant or arrangement or some other legal origin based on long-continued and adverse enjoyment of the right, in this country.

[1] *Rajrup Koer* v. *Abul Hossein*, L. R. 7 Ind. App. 240; I. L. R. 6 Cal. 394; 7 Cal. L. R. 529; *Ponnusawmi Tevar* v. *Collector of Madura*, 5 Mad. H. C. 6.

[2] *Holford* v. *Hankinson*, 5 Q. B. 584; 13 L. J. Q. B. 115. Cf. *Hollins* v. *Verney*, 11 Q. B. D. 715, *per* Lord Coleridge, C. J.; *Aynesley* v. *Glover*, L. R. 10 Ch. 283.

[3] *Rajrup Koer* v. *Abul Hossein*, supra.

A consideration of the nature of the conditions which must be satisfied, before an easement may be acquired by prescription either at Common law or under the statute, and a discussion of the several points which have arisen with regard to them, would take us very much beyond the limits which I have assigned to this lecture. For information upon these matters I can only refer you to such treatises as deal exclusively with the subject of easements.

Extent of easements acquired by prescription.—Where these water-rights are acquired by prescription, their extent must be determined by the accustomed user, that is to say, the user upon which such right is grounded. But this must not be understood to imply that the riparian owner who has acquired the right, is bound to use the water in the same precise manner, and to the same precise extent, or apply it to the same mill; that he must not enlarge the area under cultivation, or change the mode of it, or enlarge the dimensions of the wheels or the horse-power of his machinery, or change the site of his mill. For that would really prevent the growth of agriculture and stop all improvements in machinery. The true rule is, that he may change the mode, the object, and even the place of using the water, provided the variation thereby effected is not so material, as to sensibly prejudice the rights of other riparian proprietors.[1]

A difficulty may, however, arise, if the user has been varying in extent. It has been held that in such cases the Court is not bound to found its judgment solely upon the actual user proved, but may also take into consideration the surrounding circumstances.[2]

Acquisition of a prescriptive right to pollute the water of a natural stream.—A right to pollute the water of a natural stream may be acquired by prescription;[3] and where the pollution has been gradually increasing from time to time, in consequence of the discharge of addi-

[1] *Luttrel's Case*, 4 Rep. 86; *Bealy* v. *Shaw*, 6 East, 209; *Alder* v. *Savill*, 5 Taunt. 424; *Brown* v. *Best*, 1 Wils. 174; *Saunders* v. *Newman*, 1 B. & Ald. 258; *Bawendale* v. *McMurray*, L. R. 2 Ch. 790; *Perumal* v. *Ramasami*, I. L. R. 11 Mad. (16) 19. Angell on Watercourses (7th ed.), §§ 225-230; Goddard on Easements, (3rd ed.), 492-493.

[2] *Cowling* v. *Higginson*, 4 M. & W. 245; *Bealy* v. *Shaw*, 6 East, 209; *Ballard* v. *Dyson*, 1 Taunt. 279; *Williams* v. *James*, L. R. 2 C. P. 577.

[3] *Wright* v. *Williams*, 1 M. & W. 77; *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305; *Carlyon* v. *Lovering*, 1 H. & N. 784; *Moore* v. *Webb*, 1 C. B. N. S. 673; *Attorney-General* v. *Halifax*, 39 L. J Ch. 129; *Wood* v. *Sutcliffe*, 2 Sim. N. S. 163; 21 L. J. Ch. 253; *Murgatroid* v. *Robinson*, 7 E. & B. 391; 26 L. J. Q. B. 233.

tional quantity of sewage or other noxious material into the stream, the extent of the right acquired is determined by the extent of the pollution at the commencement of the prescriptive period,[1] and such period begins to run when the pollution first perceptibly prejudices the servient estate.

Right to obstruct the water of a public navigable stream.—It follows from the essential nature of prescription, namely, that it presupposes an antecedent grant, that no right to obstruct the water of a public navigable stream can be acquired by prescription, because the public is incapable of making a grant;[3] but it is questionable, whether under the Indian Easements Act (V of 1882) such a right may not be acquired by the continuance of the obstruction for a period of sixty years.[4]

Whether a right to have water diverted by another may be acquired by prescription.—In treating of the mode of acquisition of easements in the water of natural streams, I had confined myself exclusively to those cases where the easement subjects the servient owner to disadvantage, by taking from him the use of the water, for the watering of his cattle, the irrigation of his land, or the turning of his mill; but there may indeed be cases in which such easement may be attended incidentally with equal or greater advantage to him, such as, for instance, by rendering him safe from the danger of inundation, to which the cessation of the diversion of water in the accustomed mode by the dominant owner might expose him. In such cases, the servient owner, it has been held, has no right to compel the continuance of the diversion by the dominant owner, because it is a fundamental maxim of law, that the servient owner cannot by his submission to the enjoyment of the right by the dominant owner for a period of twenty years, acquire in his own favour a correlative right to insist upon the continuance of the exercise of the easement by the dominant owner even when he finds it expedient to abandon it. The Indian Easements Act, s. 50, however, provides that in such a case the servient owner is entitled to have from the dominant owner such

[1] *Goldsmid* v. *The Tunbridge Wells Improvement Commissioners*, L. R. 1 Eq. 161; on appeal, L. R. 1 Ch. 349; *Metropolitan Board of Works* v. *The London & North Western Railway Co.*, 17 Ch. D. 246; *Crossley* v. *Lightowler* L. R. 2 Ch. 478.

[2] *Goldsmid* v. *The Tunbridge Wells Improvement Commissioners*, supra; Act V of 1882 s. 15, expl. 4.

[3] *Vooght* v. *Winch*, 2 B. & Ald. 662; Angell on Watercourses (7th ed.), § 254.

[4] Section 15, last para

[5] *Mason* v. *Shrewsbury Railway Co.*, L. R. 6 Q. B. 578; *Gaved* v. *Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. (353) 363. Cf. *Wilson* v. *Waddell*, 2 App. Cas. 95.

previous notice of an intention on his part to abandon the easement, as will enable the former without unreasonable expense on his part to protect the servient estate from damage; in default of which, he is declared entitled to compensation.

Easement in respect of surface drainage.—The proprietor of lower land cannot by prescription acquire a right to the uninterrupted flow of mere surface water or surface drainage upon his land from or across the land of his upper neighbour, however long may have been the period during which he has received the discharge and enjoyed the water.[1] This is apparently founded upon the reason that the mere enjoyment of surface water by the proprietor of the lower land can afford no cause of action whatever to the proprietor of the higher land, such water being treated in law as part of the moisture of the soil, and at the absolute disposal of him over whose soil it passes. Nor indeed can the upper proprietor prevent his lower neighbour from enjoying such water, except by continually draining away the water that passes over his land,—a course so expensive and inconvenient, that it would be manifestly unreasonable to insist that he should do so, at the risk of being supposed from his abstinence, to intend to grant to his neighbour the use of the water in perpetuity, as a matter of right. But there can be no doubt, however, that the lower proprietor may acquire such a right by grant or covenant, from or with the proprietor of the upper land.[2]

Easement in respect of subterranean percolations.—No right can be acquired by prescription in subterranean percolations, because, in addition to the reasons I have just stated, there exists in respect of them the further reason that, the person upon whom the corresponding liability is sought to be imposed, cannot reasonably be required to enter his protest against the appropriation of a thing so hidden and obscure as water percolating underground.[3] As in the case of surface drainage, a right to subterranean percolations may doubtless be acquired by grant.[4]

[1] *Rawstron* v. *Taylor*, 11 Ex 369; 26 L. J. Ex. 33; *Broadbent* v *Ramsbotham*, 11 Ex. 602; 25 L. J. Ex. 115; *Greatrex* v. *Hayward*, 8 Ex. 291; 22 L. J. Ex. 137; (Cf. *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L J. Ex. 81; 5 Jur. N. S. 873); *Perumal* v. *Ramasami* I. L. R. 11 Mad 16; *Khoorshed Hossein* v. *Teknarain Sing*, 2 Cal. L. R. 141: *Kena Mahomed* v. *Bohateo Sircar*, Marsh, 506; *Robinson Ayya Krishnama*, 7 Mad. H. C (37), 46 *et seq.*

[2] *Ibid.*

[3] *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J. Ex. 81; 5 Jur. N. S., 873; *Dickinson* v. *Grand Junction Canal Co.*, 7 Ex. 282; 21 L. J Ex. 241; *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305.

[4] *Whitehead* v. *Parks*, 2 H. & N. 870; 27 L. J. Ex. 169.

Artificial streams.—An artificial stream is a stream which flows at its source by the operation of man, or, if it flows at its source by the operation of nature, flows in a channel made by man.[1] Thus, whether a stream issues from the working of a mine, or from an artificial reservoir, or whether it is made to flow in an artificial channel from a natural spring, a natural stream, a lake, or any other natural reservoir, it is in each case an artificial stream. But the mutual rights and obligations of the originator of such a stream and its subsequent appropriators are not necessarily the same in all these cases.

Ownership of artificial streams.—The water in an artificial stream flowing in the land of the person by whom it was caused to flow, is undoubtedly the property of that person, and is not subject to any rights or liabilities in respect of others.[2] If the water of such a stream is made to flow upon the land of a neighbour, without his consent, it is a trespass, a wrong, for which the person causing it to flow may be held liable.[3]

Acquisition of right in artificial streams by grant.—The originator of an artificial stream may by grant or covenant from or with his neighbour acquire a right to flow the water of that stream upon his land; and he may also by similar means subject himself to the reciprocal obligation of sending the water of that stream upon that land.[4] Where these rights and liabilities are conferred or imposed by grant or covenant, their nature and extent must be determined by the terms of the instrument creating them.

By Prescription.—Acquisition of such right as against the originator of the stream.—Temporary artificial streams.—The originator of an artificial stream may also acquire such a right by prescription;[5] but the conti-

[1] Cf. *Gaved* v. *Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353. A natural stream has been defined in the Indian Easements Act, V of 1882, as a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course. See s. 7, expl.

[2] *Gaved* v. *Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353; *Mohasoy Dwarka Nath Ghose* v. *Musst. Doorgamonee*, Cal. S. D. 1856, p. 218; *Run Bahadoor* v. *Poodhee Roy*, Suth. W. R. 1864, p. 319; *Maharanee Indurjeet Koer* v. *Lutchmee Koer*, 14 Suth. W. R. 349.

[3] *Ibid.*

[4] Cf. *Gaved* v. *Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353; *Rameshur Pershad Narain Sing* v. *Koonj Behary Pattuk*, L. R. 6 Ind. App. 33; 4 App. Cas. 121; I. L. R. 4 Cal. 633; *Gour Sahoy Sing* v. *Sheo Sahoy Sing*, 15 Suth. W. R. 94; *Maharanee Indurjeet Koer* v. *Lutchee Koer*, 14 Suth. W. R. 349; *Krishna* v. *Rayappa*, 4 Mad. H. C. 98; *Ponnusawmi Tevar* v. *The Collector of Madura*, 5 Mad. H. C. 6.

[5] *Ibid.*

nued submission by the person receiving the flow of such a stream for twenty years or upwards to the exercise of that right by the originator of the stream, does not necessarily establish in his own favour a correlative right to the continuance of the flow by the originator of the stream, even though it may be attended with incidental advantages to himself.[1] Whether the person receiving and appropriating water flowing in an artificial stream can by prescription acquire such a right against the originator of the stream, in any particular case, depends upon the character of the stream, and the circumstances under which it was created. If the stream is of a temporary nature only, such as, for instance, where it is brought to the surface in consequence of mining operations, and depends for its existence upon the continuance of those operations, no such right can be acquired, because the character of the stream in that a case, however long may have been the period during which it has been caused to flow, precludes the inference of a grant of the right in perpetuity, which, in truth, is of the essence of a right acquired by prescription.[2]

Arkwright v. Gell.—This is exemplified in the case of *Arkwright* v. *Gell*,[3] which is a leading authority upon this matter.

The plaintiffs were owners of certain cotton mills erected in 1772, which they worked by means of the flow of water in a brook, and an artificial subterranean channel, or sough (as it is called), constructed previous to that date by a mining company, for the purpose of draining a portion of their mineral field. With the permission of this mining company, and partly for their benefit, another mining company, of whom the defendants were the representatives, constructed a second sough at a lower level, in the adjoining neighbourhood, the effect of which, in 1836, was to drain away and divert the water flowing in the first sough to the injury of the plaintiff's mills. The Court of Exchequer held that, notwithstanding their uninterrupted enjoyment of the water for such a long period, the plaintiffs had acquired no right, as against the owners of the mine, to the continuance of the flow of water in the sough. Parke, B., in delivering the judgment of the Court, thus observed:—"An use for twenty years, or a longer time, would afford no presumption of a grant of

[1] *Ibid*; *Ivimey* v. *Stocker*, L. R. 1 Ch 396.

[2] *Arkwright* v. *Gell*, 5 M. & W. 203; 8 L. J. N. S. 201; *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305; *Greatrex* v *Hayward*, 8 Ex. 291; 22 L. J. Ex. 137; *Gaved* v. *Martyn*, 19 C. B. N. S. 732; 34 L. J. C. P. 353.

[3] 5 M. & W. 203; 8 L. J. N. S. 201.

the right to the water in perpetuity, for such a grant would, in truth, be neither more nor less than an obligation on the mine-owner not to work his mines, by the ordinary mode of getting minerals, below the level drained by that sough, and to keep the mines flooded up to that level, in order to make the flow of water constant, for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine-owners could have meant to burthen themselves with such a servitude, so destructive to their interests; and what is there to raise an inference of such an intention. The mine-owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the water entirely—a course so expensive and inconvenient, that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights—to infer from the abstinence of such an act an intention to grant the use of the water in perpetuity, as a matter of right".

"Several instances were put in the course of the argument of cases analogous to the present, in which it could not be contended, for a moment, that any right was acquired. A steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years. Is it possible from the fact of such an user to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burthen themselves and the assigns of his mine with the obligation to keep a steam-engine for ever for the benefit of the landowner? Or if the water from the spout of the eaves of a row of houses was to flow in an adjoining yard, and be there used for twenty years by its occupiers for domestic purposes, could it be successfully contended, that the owners of the houses had contracted an obligation not to alter their construction so as to impair the flow of water? Clearly not: in all, the nature of the case distinctly shows that no right is acquired as against the owner of the property from which the course of water takes its origin; though, as between the first and the subsequent appropriator of the watercourse itself, such a right may be acquired."

Wood v. Wuad.—Moreover, if the artificial stream be of a temporary

character, not only no rights may be acquired by prescription against the originator of the stream, but also no proprietor of land through which the stream passes has a right to prevent the proprietor of land above traversed by the same stream from diverting its water, even though it may be the whole of it. In *Wood* v. *Waud*,[1] waters issuing from a coal-mine (partly pumped up and partly caused by the overflow of an old coal-pit, which had become filled with water) had for more than fifty years flowed through two artificial subterraneous channels, one of which passed directly through the plaintiff's land; and the other passed into a natural stream, which, so augmented, passed through the plaintiff's land. The water flowing in these channels had been used by the plaintiff for nearly ten years for the purposes of their mills. The defendants who were also owners of certain mills situated on the bank of the natural stream, as well as on the bank of each of the artificial streams, but above the points where they respectively arrived at the plaintiff's land, diverted the water of those streams, and thereby interfered with the working of the mills of the plaintiff. The defendants did not claim under the owners of the colliery,—the originators of the artificial streams,—nor were they authorised by the latter to divert the water from such streams. The Court of Exchequer, under those circumstances, after re-affirming the very important principle of law laid down in the case I have just mentioned, held that the plaintiff could not maintain any action against the defendant, for such diversion, because, as it reasoned, the owners of the colliery merely got rid of a nuisance to their works by discharging the water into the artificial channels, and could not be considered as giving it to one more than to another of the proprietors of the land through which these artificial channels were constructed; each might take and use what passed through his land and the proprietor of land below had no right to any part of that water until it reached his own land; and he had no right to compel the owners above to permit the water to flow through their land for his benefit.

Greatrex v. Hayward.—Nor can a right be acquired by prescription against the owner of the land, from which the artificial stream flows, if such water originates, merely in the mode of occupation or alteration of a person's property, and is presumably of a temporary character and liable to variations. In *Greatrex* v. *Hayward*,[2] a pit in the plaintiff's close, adjoining a close of the defendant, had since 1796 been principally supplied with

[1] 8 Ex 748; 18 L. J. Ex. 305. [2] 8 Ex. 291; 22 L. J. Ex 137.

water flowing from the defendant's close through an agricultural drain for the better cultivation of the land, which water flowed thence into a ditch and then into the pit. The drain came from a hill-side through the defendant's close, through a wet, boggy soil, and not from any ascertained source, and it aided in effecting the general surface drainage of the defendant's close. In 1851 the defendant for the purpose of more effectually draining and cultivating his close, deepened the course of an old drain, and by making a communication between it and the drain which fed the plaintiff's pit, drew the water from the pit. The Court of Exchequer held, that under those circumstances no grant of the flow of the water to the plaintiff could be presumed, and that the plaintiff had no right of action for the diversion of the water.

Permanent artificial streams.—But if, on the other hand, an artificial stream be of a permanent character, and the circumstances under which it was created shew that it was intended to be such,—for instance, if it receives its supply from a natural stream, spring or a lake or any other natural source, or from the accumulation of rainfall on the surrounding land, and such stream is penned up by permanent embankments,—or if there are other similar circumstances which indicate that it was intended by its originator to be of a permanent nature, a prescriptive right to the enjoyment of the water may be acquired against him by any person through whose land the stream may happen to pass.[1]

Holker v. Porritt.—Thus in *Holker* v. *Porritt*,[2] a natural stream divided itself at a certain point into two parts, one of which flowed naturally to a trough for watering cattle, and thence escaped without any defined course on land further on, where it partly percolated through the soil and partly dispersed itself over the surface. More than twenty years before the action, the owner of the land made a reservoir to collect the diffused water and made an underground drain, through which he brought the water from the reservoir to his mill, and the water flowed thence to a river. This underground drain was undoubtedly an artificial watercourse, but the water flowed from a natural source, and the only effect of the construction of the drain was to collect the diffused water and con-

[1] *Rameshur Pershad Narain Sing* v. *Koonj Behary Pattuk*, 4 App. Cas. 121; L. R. 6 Ind. App. 33; I. L. R. 4 Cal. 633; *Holker* v. *Porritt*, L. R. 8 Ex. 107; in Ex. Ch. L. R. 10 Ex. 59; 50 L. J. Ch. 297. Cf. *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305; *Greatrex* v. *Hayward*, 8 Ex. 293; 22 L. J. Ex. 137); *Rayappan* v. *Virabhadra*, I. L. R. 7 Mad. 530; *Rajrup Koer* v. *Abul Hossein*, L. R. 7 Ind. App. 240; I. L. R. 6 Cal. 394; 7 Cal. L. R. 529.

[2] L. R. 8 Ex. 107; in Ex. Ch., L. R. 10 Ex. 59.

duct the same in a defined course through the land. Upon these facts the question arose whether the owner of the mill was entitled to the uninterrupted flow of water in the drain beyond the reservoir; and the Court of Exchequer answered the question in the affirmative.

Roberts v. Richards.—Similarly, in *Roberts* v. *Richards*[1], a small stream issuing from a spring on plaintiff's land, flowed for some distance over that land, then entered the defendant's land through which it flowed by means of an artificial channel of immemorial antiquity, and then again entered the plaintiff's land and supplied his house and farm. The plaintiff had an almost exclusive use of the water for seventy years, when the defendant interrupted and appropriated nearly all the water of the stream. It was held that both the plaintiff and the defendant were entitled to a reasonable use of the water flowing in the artificial channel, just as if it were a natural stream.

Rameshur Pershad Narain Sing v. Koonj Behary Pattuk.—But, perhaps, the most important case, as containing a full and clear exposition of the law upon this topic, is, that of *Ramessur Pershad Narain Sing* v. *Koonj Behary Pattuk*,[2] decided by the Privy Council, the facts of which were shortly as follows: A large reservoir of a permanent character, formed by artificial embankments, and fed partly by water which was brought from a natural stream by artificial channels, and partly by the collection of the rainfall on the adjoining land, existed for a long time in the respondent's estate, and was intended for the purposes of irrigation. Through a large overflow channel cut on the eastern side of this reservoir and running in a northerly direction,—in which direction the land lay,—as well as through other channels, water used to flow from this reservoir into a lower one constructed at the northern extremity of the respondent's estate, and mainly upon it; from which last reservoir water used to be carried by several channels to the estates of the appellant for the purpose of irrigating them. This lower reservoir had acquired the same name as that borne by the appellant's estate, which was situated immediately on the south of the respondent's estate, and adjoining it. It was proved that this system of irrigation had existed beyond living memory. The respondent erected a dam in the overflow channel, and also cut a new channel from the northern portion of it, the effect of which was to prevent the water in this overflow channel from

[1] 50 L. J. Ch. 297; 44 L. T. 271; compromised in appeal, 51 L. J. Ch. 944.

[2] 4 App. Cas., 121; L. R. 6 Ind. App. 38; I. L. R. 4 Cal. 633.

flowing to the lower reservoir, and to divert it altogether from the appellant's estate. The claim of the appellant was that, subject to the use of the water of the upper reservoir by the respondent for the irrigation of his estate, he (the appellant) was entitled, as of right, to the continuance of the accustomed flow of the overflow water of this reservoir, as well as of the surplus water, after irrigating the respondent's estate. The Privy Council held that, these facts fairly warranted the presumption that the enjoyment by the appellant of the water flowing through these artificial streams had an origin which conferred a right. With regard to the general principles which regulate the rights of persons through whose lands an artificial stream passes, Sir Montague Smith, in delivering the judgment of the Judicial Committee, thus observed :—

"'There is no doubt that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is, primâ facie, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin. The above distinction seems to be now clearly established, for, although it was said by the Court of Queen's Bench, in the case of *Magor* v. *Chadwick*,[1] that it was no misdirection to tell the jury that the law of watercourses is the same, whether natural or artificial, it was held in a subsequent case, which appears to their Lordships to be correctly decided—*Wood* v. *Waud*[2]—that this expression is to be considered as applicable to the particular case, and that, as a general proposition, it would be too broad. On the other hand, it appears to their Lordships that the proposition that a right to the use of water flowing through an artificial channel cannot be presumed from the time, manner, and circumstances of its enjoyment, is equally too broad and untenable.

"'It was said by the Court in *Wood* v. *Waud*[2] :—"We entirely concur with Lord Denman, C. J., that 'the proposition that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if

[1] 11 A. & E. 586.

[2] 3 Ex. 748; 18 L. J. Ex. 305.

proved to have been originally artificial, is quite indefensible'; but, on the other hand, the general proposition that, *under all circumstances*, the right to watercourses, arising from enjoyment, is the same whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to variations".

"'In a case which occurred soon after this decision, *Greatrex* v. *Hayward*,[1] Baron Parke shortly states the principle thus:—"The right of the party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse and the circumstances under which it was created."

"'In the case then in question the Court considered that the watercourse was of a temporary nature only, and that no right had been acquired by an enjoyment of twenty years.

"'In a subsequent case the Court of Queen's Bench directed a new trial, on the ground that the jury might have been misled by the direction of the learned Judge who tried the cause, to the effect that if the stream were an artificial one, no right could have been acquired in it. The Court held the direction was incorrect, "because" (in the words of the Court) "although it may have been an artificial watercourse, it may still have been originally made under such circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had, had it been a natural stream'" *Sutcliffe* v. *Booth*.[2]

Rayappan v. Virabhadra.—The principle laid down in this case was applied by the Madras High Court to *Rayappan* v. *Virabhadra*,[3] where the facts were briefly as follows: The plaintiffs had from time beyond memory enjoyed, for the irrigation of their lands, the use of surplus water flowing in a defined channel through a sluice from a tank situated in defendants' village. The defendants placed a turf dam across this channel within the limits of their property, diverted the water into

[1] 8 Ex. 293: 22 L. J. Ex. 137. [2] 32 L. J. Q. B. 136.

[3] I. L. R. 7 Mad. 530. Cf. *Ponnusawmi Tevar* v. *The Collector of Madura*, 5 Mad. H. C. 6.

a new channel dug by them, which carried the water for some distance by a different course, until it rejoined the old channel at a point lower down, and they also filled up the portion of the channel between the dam and this last point. The effect of these operations on the part of the defendants was to diminish the supply of water which the plaintiffs had been accustomed to receive through the channel. The Court held that, whether the channel was natural or artificial, the surplus water of the tank or the drainage of the fields already watered by the tank, having once entered a defined channel, and been enjoyed by the plaintiffs for such a long period, the defendants had no right to interrupt the water in the channel; and they were therefore directed to remove the obstructions, and were restrained by an injunction.

Right in artificial streams on severance of estates.—The right to the flow of water in an artificial stream may also be acquired under an implied grant, which, as a general rule, is presumed upon a severance of estates belonging to the same owner. If the owner of an estate, through which an artificial stream, of a permanent character and derived from a natural source, runs, transfers one portion and retains another, or being the owner of two estates traversed by such artificial stream, transfers one of them retaining the other, then, in the absence of any express stipulations, the transferee becomes entitled as against the transferor and those claiming under him by subsequent transfers, to the use of the water in the stream, if it is necessary to the reasonable enjoyment of the estate or the portion transferred, and has, in fact, been enjoyed during the unity of ownership.[1] Thus far the authorities are quite accordant with each other. But a question of some difficulty, and one which until recent years has been the subject of diversity of opinions, is, whether an implied reservation of a right to the enjoyment of the flow of an artificial stream may be presumed in favour of the transferor when he transfers the quasi-servient portion or estate, and retains the quasi-dominant portion or estate; in other words, whether the rule just stated may be reciprocally applied in favour of the transferor, when the undisturbed enjoyment of the use of the stream by him amounts to the imposition of a burden upon the transferee. If the two estates, or different portions of the same entire estate, pass into the hands of third

[1] *Watts* v. *Kelson*, L. R. 6 Ch. 166; *Crossley* v. *Lightowler*, L. R. 2 Ch. 478; *Polden* v. *Bastard*, L. R. 1 Q. B. 156; *Ewart* v. *Cochrane*, 4 Macq. 117; 7 Jur. N. S. 925. Cf. *Wheeldon* v. *Burrows*, 12 Ch. D. 31.

persons by simultaneous transfers, or if they are severed by a partition and they remain in the hands of the owners themselves, the authorities are agreed that there is a presumption of an implied mutual grant of a right to the use of such stream among the several transferees or owners, as the case may be.[1] But where there is neither partition nor simultaneous transfer, the result of the English authorities upon the matter seems to be that, there can be no implied reservation of such a right in favour of the transferor, inasmuch as a reservation of that kind would, it is argued, militate against the cardinal maxim of the law that no man can derogate from his own grant.[2] It is to be observed, however, that the cases to which this doctrine has been applied in England related either to the quasi-easements of light, or to drains, gutters or the like, and had no reference to the case of an artificial stream derived from a natural spring or diverted from a natural stream. It is true that the decided cases do not draw any such distinction, but, as pointed out by the learned editor of Mr. Angell's work on "The Law of Watercourses", the distinction is brought out in the cases in America,[3] where, as regards artificial streams originating from a natural source, the rule is treated as being entirely reciprocal, and an implied reservation is presumed in favour of the transferor as much as an implied grant in favour of the transferee, though no doubt as regards drains, gutters and the like, the authorities in that country also seem to be somewhat conflicting.

The Indian Easements Act, Sec. 13.—The Indian Easements Act,[4] on the other hand, lays down the rule more broadly, and, unless a different intention is expressed or necessarily implied by the instrument of transfer, entitles both the transferor and the transferee to claim as against one another all apparent and continuous quasi-easements which are necessary for enjoying the subject of transfer in the same manner in which it was enjoyed when the transfer took effect, and makes the rule equally applicable whether the severance takes place by transfer inter vivos, or by transfer by operation of law, or by a testamentary disposition, or by partition.

1 *Barnes* v. *Loach*, 4 Q. B. D. 434; *Allen* v. *Taylor*, 16 Ch. D. 355; *Amatool Russool* v. *Jhoomuch Sing*, 24 Suth. W. R. 345; *Musst. Afzulunnissa* v. *Reasuddin Hossein*, Cal. S. D. 1860, p. 554. Cf. *Pearson* v. *Spencer*, 3 B. & S. 761; *Wheeldon* v. *Burrows*, 12 Ch. D. 31; *Russell* v. *Watts*, 25 Ch. D. 559; Goddard on Easements (3rd ed.), 172; Angell on Watercourses (7th ed.), 166h—166i.

2 *Wheeldon* v. *Burrows*, 12 Ch. D. 31; *Russell* v. *Watts*, 25 Ch. D. 559.

3 Angell on Watercourses (7th ed), 166j. 4 Act V of 1882, s. 13, cl. (b), (f) and last para.

Discussion of authorities.—In those parts of India where the Indian Easements Act does not apply, the effect of the decided cases apparently is to make the rule in question reciprocal in its operation. In *Rameshur Pershad Narain Sing* v. *Koonj Behari Pattuk*,[1] the facts of which I have already stated, the Privy Council observed: "It may be that at the time when this system of irrigation was adopted, the mouzahs now belonging to the plaintiff and the defendant formed one estate, and, if so, on severance, the right to the continued flow of the water in the accustomed channels would arise and subsist (see on this point *Watts* v. *Kelson*)."[2] In this passage the Privy Council lays down the proposition broadly and affirms the right of each of the parties to the suit to the enjoyment of the continued flow of the water in the accustomed channels, independently of the circumstance that, either of them may be the original owner himself, or a person claiming from him under a title derived subsequent to the first transfer.

But in *Watts* v. *Kelson*,[2] all that the Court of Appeal, as pointed out by Lord Justice Thesiger in *Wheeldon* v. *Burrows*,[3] had to decide was, whether in case of severance there was an implied grant of an apparent and continuous quasi-easement in favour of the purchaser of the dominant estate, where it had been conveyed first, as against a subsequent purchaser of the servient estate. The facts of that case were that, in 1860 the owner of two closes A and B made a drain from a tank situated in close B to some cattle sheds in close A for the purpose of supplying them with water. They were so supplied until 1863, when the owner sold close A to the plaintiff. After his purchase, plaintiff received the supply of water to his cattle sheds as before, but it was afterwards cut off by the defendant, a subsequent purchaser of close B. The Lords Justices held that, the right to the watercourse was a right to an easement of a continuous nature, necessary to the use of close A, and passed by implication without any words of grant. In the course of the argument, however, Mellish, L. J., said: "I think that the order of the conveyance in point of date is immaterial, and that *Pyer* v. *Carter*[4] is good sense and good law. Most of the Common law judges have not approved of Lord Westbury's observations on it." James, L. J., said: "I also am satisfied with the decision in *Pyer* v. *Carter*."[4]

[1] 4 App. Cas. 121; L. R. 6 Ind. App. 33; I. L. R. 4 Cal. 633.

[2] L. R. 6 Ch. 166.

[3] 12 Ch. D. 31.

[4] 1 H. & N. 916, 26 L. J. Ex. 258.

In *Pyer* v. *Carter*,[1] the owner of two houses, had, during unity of possession, constructed a drain running under both, for discharge into a common sewer of rain-water falling on each of the premises. The owner sold to the defendant at first the house which had to bear, so to speak, the burden of allowing by the drain underneath itself, the passage of rain-water from the other house, which latter he sold to the plaintiff afterwards. The Court of Exchequer held that at the time of the conveyance to the defendant, there was, in respect of the house retained by the owner, an implied reservation of a right to the passage of water through the drain running under defendant's house, and that such right passed to the plaintiff under the subsequent conveyance of the house to him.

The doctrine laid down in this case was questioned in *Suffield* v. *Brown*,[2] and *Crossley* v. *Lightowler*,[3] and was ultimately rejected by the Court of Appeal in *Wheeldon* v. *Burrows*.[4] In the same case the Court of Appeal strongly dissented from the observations of Lords Justices Mellish and James in *Watts* v. *Kelson*[5] to which I have just referred. The ratio decidendi of the judgment in *Wheeldon* v. *Burrows*,[4] it may be mentioned by the way, was followed by the Court of Appeal in *Russell* v. *Watts*,[6] and adopted by Lord Selborne, L. C., in the opinion which he delivered, when that case came before the House of Lords in appeal.[7] I have adverted to these facts for the purpose of shewing that since the Privy Council had, in *Rameshur Pershad Narain Sing* v. *Koonj Behary Pattuk*,[8] cited *Watts* v. *Kelson*[5] in support of the proposition laid down by it, and to which I have already called your attention, the authority of that case, in so far as it had expressed its approval of *Pyer* v. *Carter*,[1] has been seriously weakened by the criticisms made on it by the Court of Appeal in *Wheeldon* v. *Burrows*.[4]

Closely similar to the circumstances of *Watts* v. *Kelson*,[5] were those of *Amatool Russool* v. *Jhoomuch Sing*,[9] and *Morgan* v. *Kirby*,[10] decided in this

1 1 H. & N. 916; 26 L. J. Ex. 258.
2 4 DeG. J. & S. 165; 33 L. J. Ch. 249.
3 L. R. 2 Ch. (478) 486.
4 12 Ch. D. 31.
5 L. R. 6 Ch. 166.
6 25 Ch. D. 559.
7 *Russell* v. *Watts*, 10 App. Cas., (590) 596.
8 4 App. Cas. 121; L. R. 6 Ind. App. 33; I. L. R. 4 Cal. 633.
9 24 Suth. W. R. 345.
10 I. L. R. 2 Mad. 46.

country. In the former, the plaintiff and the defendant respectively were the auction-purchasers at the same revenue-sale of two conterminous mouzahs Sesawan and Chuttur, both belonging to the same owner, who for the irrigation of those mouzahs constructed an artificial watercourse running from a brook through Chuttur on to Sesawan. The Court held that both parties were entitled to a reasonable enjoyment of the water flowing in the watercourse, and that the measure of it was to be determined by the mode of user adopted in respect of either of the mouzahs by the original owner. In the latter, a lessee for 999 years, (represented by the plaintiff in the suit) of an estate from Government, which he took for the purposes of tea plantation, cut an artificial channel for conveying water from a ravine in Government waste to his own estate through land also belonging to Government, but which land it subsequently leased to the defendant. The defendant intercepted the flow of water in the channel, and on the suit of the plaintiff for damages and injunction to restrain the defendant from interfering with and diverting the flow of water, the Court held that plaintiff was not exclusively entitled to the uninterrupted flow of the water in the channel, but that both parties were entitled to a reasonable use of the water.

Right to scour or repair the channel of an artificial stream.—Upon the principle that whosoever grants a thing is supposed also tacitly to grant that without which the grant would be of no effect, a right to the flow of water in an artificial stream, running through a neighbour's land, whether such right be derived under a grant or by prescription, carries with it a right of going over that land to scour or repair the channel, or repair any dam which may have been built therein.[1]

Extinction of easements—By unity of absolute ownership.—I have already observed in a previous lecture,[2] that the natural rights of riparian proprietors in the water of a natural stream are not extinguished by unity of possession or ownership of land above or below, nor lost by disuse. Acquired rights or easements, as well in natural as in artificial streams, may however, be extinguished in these and other modes too. They may be extinguished by the union in the same person of the fee, that is to say, of the absolute ownership of both the dominant and the servient tene-

[1] *Hinchcliffe* v. *Earl of Kinnoul*, 5 Bing. N. C. 1. Cf. *Ramesshur Pershad Narain Sing* v. *Koonj Behary Pattuk*, 4 App. Cas. (121) 130; L. R. 6 Ind. App. (33) 45; I. L. R. 4 Cal. (633) 644.

[2] *Supra*, 260—261

ments.[1] Where the dominant owner becomes entitled to a limited interest in the servient tenement, or, conversely, the servient owner becomes entitled to a limited interest in the dominant tenement, the easement is not extinguished, but is merely suspended, ready to revive again upon a severance taking place.[2]

If, for instance, the dominant tenement is held in fee, and the servient tenement for a term of, say, five hundred years, the subsequent acquisition of these two tenements by the same person does not extinguish the easement, but only suspends it,[3] nor does the easement become extinguished, if one of the tenements is held under a good title, and the other under a title which is defective.[4]

By alterations in the dominant tenement.—These easements may also, as a general rule, be extinguished by such a change in the mode or the object of their user, consequent upon a permanent alteration in the condition of the dominant tenement, as materially to increase the burden on the servient tenement, unless the easement was intended for the benefit of the dominant tenement to whatever purpose it should be applied, or in whatever manner it should be used.[5]

By efflux of time or fulfilment of condition.—Where these easements are acquired under a grant, for a limited period, or on condition that they shall become void on the performance or non-performance of a certain specified act, they are extinguished when the period expires or the condition is fulfilled.[6]

By express release.—Again, these easements may be extinguished by an express release, that is to say, by a re-grant of the right by the dominant to the servient owner.

By abandonment.—They may also be extinguished by an implied release or abandonment. Mere cesser of use, unaccompanied by any other circumstance, unless such cesser is continued for a period of twenty years, does not amount to an abandonment of the easement.[7] But disuse even for

1 *James* v. *Plant*, 4 A & E. p. 761; *Ivimey* v. *Stocker*, L. R. 1 Ch. 407, *per* Lord Cranworth, L. C. The Indian Easements Act (V of 1882) s. 46, and illustrations.

2 The Indian Easements Act (V of 1882) s. 49.

3 *Thomas* v. *Thomas*, 2 C. M. & R. 34; *Simper* v. *Foley*, 2 J. & H. 555.

4 *Tyler* v. *Hammond*, 11 Pick. (Amer.), 193, cited in Angell on Watercourses (7th ed.) § 198.

5 Cf. *United Land Co.* v. *Great Eastern Railway*, L. R. 10 Ch. 586; *Newcomen* v. *Coulson*, 5 Ch. D. 133. The Indian Easements Act (V of 1882) s. 43.

6 The *National Guaranteed Manure Co.* v. *Donald*, 4 H. & N. 8; 28 L. J. Ex. 185. The Indian Easements Act (V of 1882), s. 40.

7 *Crossley* v. *Lightowler*, L. R. 3 Eq. 279; L. R. 2 Ch. 478; *Ponnusawmi Tevar* v. *The*

a shorter period, may justify an inference of abandonment, if the dominant owner makes such a permanent alteration in his tenement as to indicate an intention on his part to abandon the enjoyment of the easement in future;[1] or if he ceases to exercise the easement, and the servient owner, or a purchaser from him, upon the faith of such cessation in the user, acts to his prejudice, by effecting any permanent change in the servient tenement, the necessary consequence of which is to prevent the dominant owner from resuming the exercise of the easement in future.[2] It is clear that a mere temporary discontinuance of user, even for twenty years, will not cause extinction of the easement, where the discontinuance takes place in pursuance of a contract between the dominant and the servient owners.[3]

V. Right to erect defences against the encroachment or the flood of the river.—Extent of the right in case of ordinary floods.—This is the last of the several kinds of riparian rights which have been already enumerated. Except in those rivers or parts of rivers where the state exercises the right of maintaining defences against the incursions of their waters,[4] every riparian proprietor has a right to erect walls and embankments to defend his own land against the encroachment of the river, or to prevent its being overflowed by any change in the natural state of the river.[5] But in neither case is he at liberty to execute

Collector of Madura, 5 Mad. H C. 6; Angell on Watercourses, (7th ed.) §§ 245—252; Goddard (3rd ed.), 497-498, 501-502. See the Indian Easements Act (V of 1882), s. 47.

[1] *Reg.* v. *Chorley*, 12 Q. B. p. 519; *Moore* v. *Rawson*, 3 B. & C. 322; *Drewitt* v. *Sheard*, 7 C. & P. 465; *Cook* v. *Mayor of Bath*, L R. 6 Eq 177; *Jugutbundhu Chuckerbutty* v. *Jugut Chunder Chowdhry*, 12 Suth. W. R. 519; Angell on Watercourses (7th ed.), §§ 247, 248. See the Indian Easements Act (V of 1882), s. 38, cl. (*a*).

[2] Goddard on Easements (3rd ed.), 499; Angell on Watercourses (7th ed.), § 250; *Ponnusawmi Tevar* v. *The Collector of Madura*, 5 Mad. H. C. 6. See the Indian Easements Act (V of 1882), s 38, cl. (*b*), which requires that in order to support an inference of abandonment, the permanent change in the servient tenement should have been *expressly authorized* by the dominant owner.

[3] *Davies* v. *Morgan*, 4 B. & C. 8; *Lovell* v. *Smith*, 3 C. B. N. S. 120; Goddard on Easements, (3rd ed.) 502—503. See the Indian Easements Act (V of 1882), s. 47, cl. (*a*).

[4] In England, Commissioners of Sewers are entrusted with this duty by certain Acts of Parliament, called the Statutes of Sewers, which are principally the following:—23 Hen. VIII, c. 5; 13 Eliz. c. 9; 7 Anne, c. 33; 3 & 4 Will IV. c. 22; 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50; and 24 & 25 Vict. c. 133. In Bengal, this duty is now performed by the Collector under Act VI of 1873 (B. C.), which has repealed Act XXXII of 1855, except so far as it related to Orissa and the Sunderbuns.

[5] *Menzies* v. *Breadalbane*, 3 Wils. & Shaw, 243; 3 Bligh (N. S.) 414; *Rex* v. *Trafford*, 1 B. & Ad. 880; 8 Bing. 204.

his work in such a mode as to prejudice navigation or inflict any sensible injury upon the opposite or any other riparian proprietor.[1]

Extent of the right in case of extraordinary floods.—This is the rule in the case of ordinary floods, but in the case of extraordinary floods, such as come within the definition of accidental and extraordinary casualties, as, for instance, when a flood suddenly bursts forth in consequence of a storm or any other like cause, law allows a riparian proprietor to exercise a 'reasonable selfishness' in protecting himself from such disaster, and to do such acts as may be necessary to ensure his safety, even though in their result those acts may be productive of damage or harm to other persons.[2] A littoral proprietor exposed to the inroads of the sea enjoys the same privilege as a riparian proprietor does in the case of extraodinary floods,[3] but in either case, it is subject to the condition that it is exercised bonâ fide for the preservation of one's own property, and not with the object of occasioning damage to other persons.[4]

Alteration of the natural condition of frontage by riparian or littoral owners.—How an obligation to maintain and repair an embankment may be imposed on a frontager.—Although a frontager (riparian or littoral) may, by altering the natural condition of his land bordering on a river (or the sea), render himself liable to his neighbours or to any other person, who suffers in consequence of such act, as, for instance, when the water rushes through a breach made in the bank by the removal of earth or a natural barrier of shingle, flows over his land, and spoils his crops or does any other kind of damage,[5] yet by the Common law of England such frontager is under no obligation to maintain and repair a wall or an embankment or any other artificial barrier on his land in order to protect the property of his neighbour;[6] nor does there exist any such obligation on his part by the 'original or Common law' of this country.[7] But in England such liability may

1 *Attorney-General* v. *Earl of Lonsdale*, L. R. 7 Eq. 377; *Bickett* v *Morris*, L. R. 1 H. L. (Sc. App.) 47; *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839.

2 *Nield* v. *London & North Western Railway Co.*, L. R. 10 Ex. 4. Cf. *Menzies* v. *Breadalbane*, 3 Wils. & Shaw, 243; 3 Bligh. (N. S.), 414.

3 *Rex* v. *Commissioners of Pagham*, 8 B. & C. 355; *Rex* v. *Trafford*, 1 B & Ad. 880; 8 Bing. 204.

4 *Ibid.*

5 *Attorney-General* v. *Tomline*, 12 Ch. D. 214; 14 Ch. D. 58; *Crompton* v. *Lee*, 31 L. T. (N. S.) 469.

6 *Hudson* v. *Tabor*, 1 Q. B. D. 225; 2 Q. B. D. 290.

7 *Nuffer Chunder Bhutto* v. *Jotendro Mohun Tagore*, I. L. R. 7 Cal. 505; 8 Cal. L. R. 553.

arise by prescription, tenure or custom,[1] and in this country by prescription or tenure, or by the acceptance of money from Government for the maintenance and repair of embankments,[2] for the public benefit.

Hudson v. Tabor.—In *Hudson* v. *Tabor*,[3] the plaintiff was the occupier and the defendant the owner of lands adjoining each other and fronting a tidal estuary. Along the front of these lands, and for a long way on either side of them, a sea-wall had been maintained, time out of mind, to keep back the sea water from overflowing the lands inside the wall on the occasion of high tides. It was necessary from time to time to put fresh materials on the top of the walls to keep them up to the proper height. The defendant, (whose land was higher in level than that of the plaintiff,) had neglected so to 'top' his wall, and owing to an extraordinary high tide, the water flowed over his wall, and so from the defendant's land on to the plaintiff's, doing considerable damage to the latter. The Court of Appeal held that no liability was cast on the defendant by the Common law, though it might undoubtedly arise by prescription.

Nuffer Chunder Bhutto v. Jotendro Mohun Tagore.—In *Nuffer Chunder Bhutto* v. *Jotendro Mohun Tagore*,[4] the facts were as follows: The plaintiff was the putnidar of a village situated on the north of, and adjacent to, another village, which was comprised in a zemindari estate owned by the defendants. A hill-stream which flowed along the western boundary of both the villages from south to north, broke through the marginal embankment into the village on the south belonging to the defendants, and thence inundated plaintiff's village on the north. The plaintiff brought an action for damages against the defendants for the loss sustained by him, alleging that the latter was bound to maintain proper embankments in order to keep out the river, and that the loss arose in consequence of his neglect to repair an embankment which was in existence at the time. The kabuliat given to Government by the predecessor of the defendants at the time of the Permanent Settlement of their zamindari contained the following clause:—"I shall do embankment work of the said mouzahs at the proper time. Should there be any loss from my negligence, I will bear the same." It was

[1] *Hudson* v. *Tabor*, 1 Q. B. D. 225; 2 Q. B. D. 290. *Keighley's case*, 10 Rep. 139a; *Rex* v. *Commissioners of Sewers for Essex*, 1 B. & C. 477; *The Queen* v. *Commissioners of Sewers for Essex*, 14 Q. B. D. (501) 570, *per* Lord Coleridge, C. J.

[2] *Nuffer Chunder Bhutto* v. *Jotendro Mohun Tagore*, I. L. R. 7 Cal. 504; 8 C. L. 553.

[3] 1 Q. B. D. 225; 2 Q. B. D. 290.

[4] I. L. R. 7 Cal. 505; 8 Cal. L. R. 553.

proved that the defendant had received an annual sum from Government as a contribution to the repairs of embankments, but such payment was not provided for in the kabuliat, and no evidence was given as to the terms of the agreement under which it was paid. The High Court held that no liability was cast upon the defendants by the 'original or Common law' of the land, and that they were not liable under the terms of the kabuliat, because it did not appear that the embankment in question was in existence at the date of the kabuliat. But the Court was of opinion that, if the sum paid by Government was in consideration of the defendants' maintaining that embankment, and if the terms of the agreement under which it was paid, shewed that it was intended to impose the obligation to repair for the public benefit, the defendants would be liable to indemnify any person who sustained damage in consequence of their neglect to repair.

Extent of such obligation in case of ordinary and extraordinary floods respectively.—Where the liability on the part of a frontager to maintain and repair a wall or embankment against the incursions or overflow of the river or the sea arises in any of the modes I have just mentioned, its extent must be determined by usage. As a general rule, the liability only extends to the maintenance and repair of such wall or embankment as is sufficient to resist ordinary floods or tides[1], but an exceptional liability on the part of a frontager to maintain and repair a wall or embankment even against extraordinary floods or tides may be established in favour of the person claiming a right to be protected by such wall, if he can prove such liability by clear and positive evidence.[2]

[1] *The Queen* v. *Commissioners of Sewers for Essex*, 14 Q B. D. 561; *Keighley's case*, 10 Rep. 139*a*; *Rex* v. *Commissioners of Sewers for Somerset*, 8 T. R. 312.

[2] *Reg.* v. *Leigh*, 10 A. & E. 398; *The Queen* v *Commissioners of Sewers for Essex*, *supra*.

LECTURE XIII.

FISHERY.

Division of the subject—Essential nature of right of fishery – Enumeration and definition of the different kinds of right of fishery recognised by English law—Distinction between each of these kinds—A I. Fishery in the high sea—II. Fishery in the territorial waters—III (*a*). Fishery over the foreshore of the sea, and in tidal waters—Right of fishery in such waters primâ facie vested in the public—Extent of the right—Mode in which this right may lawfully be exercised—Foundation of the right—Discussion of authorities—Effect of alteration of the channel of a tidal navigable river upon the public right of fishery—Prerogative of the Crown to appropriate or grant several fisheries in tidal waters anterior to Magna Charta—Effect of Magna Charta on such prerogative—In what cases may a claim by a private individual to a several fishery in tidal waters, be valid?—Reversion to the Crown of a several fishery in tidal waters by forfeiture or otherwise—Modes in which a right to a several fishery in tidal waters may be claimed by a subject—Nature of proof requisite in each case—Kinds of several fishery in tidal waters—Nature of each kind of several fishery—Does the right to a several fishery in tidal waters raise any presumption as to the ownership of the subjacent soil?—Effect of shifting of the channel of a tidal navigable river upon the ownership of a several fishery—*Mayor of Carlisle* v. *Graham*—Free fishery in tidal waters—Restrictions upon the enjoyment of a several fishery or a public right of fishery in tidal waters—Fishery in non-tidal rivers and streams—Right of fishery in such waters primâ facie vested in the riparian owerns—Foundation and nature of the right—Enumeration of the different kinds of right of fishery in such waters—Ambiguity of the term 'several fishery,' when applied to non-tidal waters—Modes in which a several fishery in such waters may be created—Does the right to a several fishery in non-tidal waters raise any presumption as to the ownership of the subjacent soil?—Several fishery in one, subject to a limited right in another—Free fishery in non-tidal waters—Franchise fishery in non-tidal waters—Effect of shifting of the channel of a non-tidal river upon the right of fishery—*Foster* v. *Wright*—Restrictions upon the exercise of the right of fishery in those non-tidal rivers that are navigable—Obstruction to the passage of fish.

In this and the following lecture I shall discuss some of the general principles of the law of fishery as it obtains in England and in this country respectively, under the following heads:—

Division of the subject.—

A. Fishery. (i.) In the high sea.

(ii.) In the territorial waters.

(iii.) Over the foreshore of the sea, and in rivers considered,

(*a*.) With reference to their tidal character; as well as

(*b.*) With reference to their navigable character,

(iv.) In lakes and ponds.

B. Topics relating to rights of fishery in general.

C. Remedies for the disturbance of rights of fishery.

Essential nature of right of fishery.—It should scarcely be needful to premise that the right of fishery which a person might possess in any piece of water is not a right to the fishes living in such water at any time,—for fishes, like other ferae naturae, cannot, (except in certain instances, which I shall notice hereafter) be in the possession or dominion of any man until they are actually captured,[1]—but that it is simply a right to catch them.

This right may exist either in connection with, or independently of, the ownership of the soil over which water stands or flows. When it is connected with the ownership of the soil, it is merely a mode of enjoyment of the land which happens for the time being to be covered with water, or a species of profit arising out of such land,—a mere attribute of ownership thereof—and is described (for the sake of distinguishing it from the right of fishery, properly so called, and of avoiding any possible risk of confusion), as predial or territorial fishery.[2] When this right is independent of the ownership of the soil, it is, according to English law, either a common right—like the public right of fishery in the sea and tidal or navigable waters;—or it is a profit à prendre in alieno solo, a liberty of fishing in the water standing or flowing over the soil of another person, in which case it is a right of fishery, strictly so called; and arises either by grant from the owner of the soil or by prescription; or by grant from the Crown, as owner of the beds of tidal waters; or from the state, as owner of the beds of navigable rivers.

Enumeration and definition of the different kinds of right of fishery recognised by English law.—According to English law, fisheries are said to be of four kinds, *viz.*,—(i) A common fishery; (ii) a several fishery; (iii) a free fishery; and (iv) a common of fishery. A fishery in gross is also sometimes mentioned; but this may be resolved into the last three kinds, because it is merely one or other of them when enjoyed apart from and independently of the ownership of any land.

A common or public fishery is the right enjoyed by all the mem-

[1] Animalia non domestica, quae in mari nascuntur, quae cum capiuntur, captoris fiunt. Fleta, lib. iii. c. 2.

[2] Schultes' Aquatic Rights, 87; Woolrych on Waters (2nd ed.), 113.

bers of the public to fish in the sea and in tidal navigable rivers as far as the flux and reflux of the tide.[1]

A several or separate fishery is a right of fishing which a single individual or a corporation may have in any particular place within known and defined limits to the exclusion of all others.[2]

A free fishery is said to be a fishery in a certain place, not exclusive, but owned in common with one or more individuals,[3] including the owner of the soil.[4]

A common of fishery is much the same as a free fishery,[5] *i. e.*, a right to fish in conjunction with others; but it is generally used to express the right acquired by tenants of a manor to fish in the waters of the lord. It very much resembles the other kind of commons in its nature, and therefore depends for its validity on the custom of the manor in each case. It is generally appendant or appurtenant to the copyhold tenements of a manor; but in some cases it is held in gross.[6]

Distinction between each of these kinds.—It will thus appear from the foregoing description of the several kinds of fishery, that, the only substantial distinction between a several and a free fishery is that the one is exclusive, and the other is enjoyed in common with two or more persons; but, according to the current of English authorities, another distinction exists between them, namely, that a several fishery in non-tidal waters implies a right to the subjacent soil, whilst a free fishery does not.

A third distinction between these two kinds of fisheries is one which relates to pleading, and which played so important a part at a time when

[1] *Musset* v. *Burch*, 35 L T. N. S. 486; *Hargreaves* v. *Diddams*, L. R. 10 Q. B. 587; *Bloomfield* v. *Johnson*, Ir. R. 8 C L. 68.

[2] Hale, de Iure Maris, p. 1, c. 5; Hargrave's Law Tracts, 18; *Malcolmson* v. *O'Dea*, 10 H. L. C. 593, *per* Willes, J.; *Holford* v. *Bailey*, 13 Q. B. 445; *Bloomfield* v. *Johnson*, Ir R. 8 C. L. 68.

[3] Co. Litt. 122*a*; *Seymour* v. *Courtenay*, 5 Burr. 2814; *Holford* v. *Bailey*, 13 Q. B. 445; *Malcolmson* v. *O'Dea*, 10 H. L C 593.

[4] Co. Litt. 122; *Seymour* v. *Courtenay*, 5 Burr. 2814; Hall on Seashore (2nd ed.), 67; Paterson's Fishery Laws, 46; Hall on Profits à Prendre, &c, 312; Schultes maintains that free fishery is synonymous with common of fishery, but entirely distinct from several fishery. Aquatic Rights, 35-36. Serjeant Woolrych also comes to the same conclusion. Woolrych on Waters (2nd ed.), 122-123.

[5] Schultes' Aquatic Rights, 62.

[6] Coulson & Forbes' Law of Waters, 340-341; Woolrych on Waters (2nd ed), 127; Hall on Profits à Prendre, &c., 307.

different forms of action could not be joined together in the same action. An owner of a several fishery, whether he owned the subjacent soil or not, could maintain an action of trespass for the breaking of his fishery and the taking of the fish; but the owners of a free fishery, unless he also happened to be the owner of the soil, could not maintain trespass, but had only a right of action in the case for the disturbance of the right.[1]

The expression "free fishery" is also some times used interchangeably with several fishery, and with regard to this equivocal use of the word, Willes, J., thus observes in *Malcolmson* v. *O'Dea*[2]:—"Some discussion took place during the argument as to the proper name of such a fishery, whether it ought not to have been called in the pleadings, following Blackstone, a 'free' instead of 'several' fishery. This is more of the confusion which the ambiguous use of the word 'free' has occasioned, from as early as the Year Book, 7 Hen. VII. 13, down to the case of *Holford* v. *Bailey* (13 Q. B. 444), where it was clearly shown that the only substantial distinction is between an exclusive right of fishery, usually called 'several,' sometimes 'free' (used as in free warren) and a right in common with others, usually called, 'common of fishery,' sometimes 'free' (used as in free port). The fishery in this case is sufficiently described as a several fishery, which means, an exclusive right to fish in a given place, either with or without the property in the soil."

Instead of the four kinds of fishery just mentioned, a simpler and a more logical classification of the subject-matter would perhaps be a division of them into (i) a right of fishery common to all, and (ii) a right vested exclusively in (*a*) one or (*b*) in a few individuals.[3]

A. I. Fishery in the high sea.—The right of universal mankind to fish in the open sea has been enunciated in the responses of the earliest Roman jurisconsults. In mare piscantibus liberum est[4]—was the language of Gaius. The consensus of civilized nations has sanctioned the same general privilege in favour of all the nations of the world, without any restriction or qualification, save such as might arise from the force of any recognized custom prevailing over any portion of the

1 *Bloomfield* v. *Johnson*, Ir. R. 8 C. L. 68.

2 10 H. L. C. 593; see also *Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. (687) 697.

3 3 Kent, Comm. 411.

4 Dig. i. 8. 5. 1, (Gaius). *Vide etiam.* Dig. xlvii. 10. 13. 7, (Ulpian).

sea, with regard to any particular kind of fishery, *e. g.*, the custom of whale fishery in Greenland.[1]

Fishery in the open sea is imprescriptible, because prescription presupposes a grant, which can only be made in respect of such things as can form the subject of exclusive property. But the right of fishery in the open sea, is, as I have said just now, common to all mankind.

II. Fishery in the territorial waters.—The right of fishing in the territorial waters of a state is vested by international law, as evidenced by treaty or immemorial user, in that state exclusively; and the subjects of no other state can fish in such waters without a license from the Crown or the sovereign authority of that littoral state.

According to English law, the right of fishing in the territorial waters of Great Britain is common to all the subjects of the realm; and in the case of *Gann* v. *Free Fishers of Whitstable*,[2] the House of Lords recognized the validity of a claim by a subject to an exclusive fishery in the territorial waters by prescription and immemorial enjoyment, presupposing a grant from the Crown prior to Magna Charta. If the right of the Crown to grant a several fishery in the sea before Magna Charta arose from and was dependent upon its ownership of the subjacent soil, it might be doubted whether after the judgment in *Reg.* v. *Keyn*,[3] such a grant would still be deemed valid in law.

In India, the equal liberty of all the subjects to fish in the territorial waters has been judicially affirmed by the High Court of Bombay[4], albeit it is subject to the right of Government to appropriate the soil of the bed of the sea within the marine zone, or the fishery within that limit. This common right must, however, be enjoyed by every member of the public, under the limitations embodied in the maxim, sic utere tuo ut alienum non laedas, in a fair and reasonable manner so as not to interfere with the enjoyment of the same right by others; and any act on the part of any member whereby the exercise of the same right by another is prevented or interfered with, is, if special injury results to him therefrom, actionable at his instance and restrainable by an injunction.[5]

[1] Woolrych on Waters (2nd ed.), 78.

[2] 11 C. B. N. S. 387; 11 H. L. C. 192.

[3] 2 Ex. D. 63.

[4] *Baban Mayacha* v. *Nagu Shravucha and others*, I. L. R. 2 Bomb. 19; *Reg.* v. *Kastya Rama*, 8 Bomb. H. C., 67.

[5] *Baban Mayacha* v. *Nagu Shravucha and others*, supra.

III. (a.) Fishery over the foreshore of the sea, and in tidal waters.—The right of fishery in such waters prima facie vested in the public.—Under the former heading I shall discuss some of the leading principles of the law of England relating to rights of fishery.

The right of fishing over the foreshore of the sea, in estuaries and arms of the sea, and in public navigable rivers, as far as the flux and reflux of the tide, is primâ facie, by the Common law of England, vested in all the subjects of the realm.[1] "The right of fishing" says Lord Hale "in the sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the wastes whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river." And after citing some precedents, he continues:—"But though the king is the owner of this great waste, and as a consequent of his propriety, hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks or navigable rivers, where, either the king or some particular subject hath gained a propriety exclusive of that common liberty."[2] "This right," says Schultes, "is coeval with the prerogatives of the Crown itself,"[3] and in another passage, observes the same learned writer:—"And herein we shall premise that the right of fishing never was vested in the Crown exclusively, and of course is not to be considered as a regal franchise. As a public right belonging to the people, it primâ facie vests in the Crown, but such legal investment does not diminish the right or counteract its exertion".[4]

Divergent theories as to the origin of this right have at various times been propounded. Some have maintained that this right was originally a grant from the Crown to the people; some, that it was reserved by the

[1] *Malcolmson* v. *O'Dea*, 10 H. L. C. 593; *Murphy* v. *Ryan*, Ir. R. 2 C. L. 143; *Neill* v. *Duke of Devonshire*, 8 App Cas. (135) 177-179, *per* Lord Blackburn; *Bristowe* v. *Cormican*, 3 App. Cas. (641) 655-656, *per* Lord Blackburn; *Goodman* v. *Mayor of Saltash*, (633) 651, *per* Lord Blackburn; *Reg.* v. *Stimpson*, 4 B. & S. 301; 32 L. J. M. C. 208; *Carter* v. *Murcott*, 4 Burr. 2163; *Fitzwalter's case*, 1 Mod. 106.

[2] Hale de Iure Maris, p. 1, c. 4; Hargrave's Law Tracts, 11; Morris' Hist. of the Foreshore, 376-377.

[3] Schultes' Aquatic Rights, 72.

[4] *Ibid.*, 15.

people when they vested the rest of the property in the sea in the sovereign; while others have ranked it among those natural and necessary rights which, like the air we breathe, has ever been freely and absolutely enjoyed. Whether any of these theories is correct or not, we shall not pause to enquire, for the conclusion in all these cases is the same, namely, that this right of fishing has immemorially belonged to, and been enjoyed by, the public; and that, in point of title, it is admitted to be held and enjoyed by common right, *i. e.*, by the common law and custom of the realm.

Extent of the right.—As every member of the public has a concurrent right to the participation of this common benefit, it is clear that if any one exercises this right in such a manner as unduly to interfere with or abridge the equal rights of others, such conduct amounts to a nuisance, and is indictable, and may also be actionable,—if it occasions particular damage to any one,—at the instance of him who sustains such damage.[2]

Mode in which the right may lawfully be exercised.—It follows further from the same principle that, no one can exercise this public right by means of weirs, stakes, or fixed enclosures or fishing-places; for an enclosure by one person amounts to an exclusion of others from it; moreover, fishing in any of these modes involves a virtual appropriation pro tanto of the soil of the public domain, which is a purpresture. It would seem, therefore, that this public right of fishing can be carried on by means of nets, hooks or other moveable apparatus only.[3]

Foundation of the right.—A current of modern decisions may now be taken to have firmly established the doctrine that, this public right is co-extensive with, and dependent upon, the ownership of the subjacent soil by the Crown, as trustee for the public; that it is confined to the sea, and such rivers as are navigable as well as tidal, and as far only as they are tidal, even though the rivers beyond the influence of the tide may have been navigated from time immemorial for the purposes of commerce. The reason for this rule appears to be that, beyond the point

[1] Hall on the Seashore (2nd ed.), 42; *Malcolmson* v. *O'Dea*, 10 H. L. C. (593) 619; *Marshall* v. *Ulleswater Steam Navigation Co.*, 3 B. & S. 732; *Murphy* v. *Ryan*, Ir. R. 2 C. L. 143; *Neill* v. *Duke of Devonshire*, 8 App. Cas., (135) 157, *per* Lord O'Hagan.

[2] *Hamilton* v. *Marquis of Donegal*, 3 Ridg. P. C. 267; judgment of Fishery Commissioners, in *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 664.

[3] Hall on the Seashore (2nd ed.), 50-52; Coulson & Forbes' Law of Waters, 358. The Salmon Fishery Acts expressly provide for the particular apparatuses to be used for the catching of salmon.

reached by the tide, the soil of the bed is in law, primâ facie, deemed to be the property of the riparian owners, and the right of fishing private.[1]

Discussion of authorities.—The absolute dependence of this right upon the ownership of the soil of the bed by the Crown, seems to have been placed beyond all doubt by the Court of Exchequer in *Mayor of Carlisle* v. *Graham*.[2] In that case a tidal navigable river suddenly shifted its channel, forming by the irruption of its waters an entirely new channel through the land of a private owner. The Court held that as the Crown did not thereby acquire the ownership of the soil of the new channel, which still continued to be in its former owner, the public right of fishing was not transferred to the new channel, though, doubtless, it became subject to the public right of navigation. Here the new channel was both navigable and tidal, and yet the public right of fishery did not accrue, because the primâ facie right of the Crown to the soil of the bed was rebutted in this case by the pre-existent ownership of a private subject, which, notwithstanding the occurrence of a change in the condition of the land, remained, except, as regards the public right of navigation, wholly untouched.

That this is the only correct view of the law upon this point is further confirmed by the decision of the Court of Queen's Bench in *Hargreaves* v. *Diddams*.[3] In that case a non-tidal and non-navigable river was made navigable by artificial operations executed under powers conferred by an Act of Parliament, which left untouched the rights of the riparian owners to the soil of the bed. It was held that the public did not acquire any right of fishing in such waters. The case of *Musset* v. *Burch*[4], in which the Court of Exchequer followed the above ruling, carried the doctrine still further, because there the public was held not entitled to fish, notwithstanding evidence had been adduced of the exercise by the public of the right of fishery in the waters in question for more than forty years.

Effect of alteration of the channel of a tidal navigable river upon the public right of fishery.—From the doctrine above stated, follows an important consequence, namely, that when a tidal navigable river, by gradual and imperceptible means, encroaches upon the

[1] *Murphy* v. *Ryan*, Ir. R. 2. C. L. 413; *Bloomfield* v. *Johnson*, Ir. R. 8 C. L 68; *Pearce* v. *Scotcher*, 9 Q. B. D. 162. See also *Reg.* v. *Burrow*, 34 Justice of Peace, 53, where Cockburn, C J., expressed a doubt with regard to the correctness of the doctrine stated in *Murphy* v. *Ryan*, supra, namely, that the public has no right to fish in a navigable river above the flow of the tide.

[2] L. R. 4 Ex. 361. [3] L. R. 10 Q. B. 582. [4] 35 L. T. N. S. 486.

land of a subject, and thereby changes its course, the public right of fishing is transferred to this new channel, even though the extent of the encroachment be clearly ascertainable;[1] but that when an alteration in the channel takes place by means of a sudden and manifest change, the right of the subject to the soil, though now covered by water, continues as before, and the public does not acquire any right of fishing in the new channel.[2]

Prerogative of the Crown to appropriate or grant several fisheries in tidal waters anterior to Magna Charta.—Although the right of fishing over the foreshore of the sea and in tidal waters, primâ facie, de iure communi, belongs to all the subjects of the realm, yet, antecedent to Magna Charta, the Crown possessed the power of either appropriating itself[3], or granting to any of them a several fishery in any portion of such waters (either with a right to the soil annexed or without it), and thereby excluding the public from the enjoyment of their 'inherent right.'

Effect of Magna Charta on such prerogative.—The Great Charter restrained the exercise of this royal prerogative, and forbade appropriations or the creation of several grants for the future, although it left untouched such appropriations or several grants as had been made not later than the time of legal memory, that is, the reign of Henry II.[4]

In what cases may a claim by a private individual to a

1 *Foster* v. *Wright* 4. C. P. D. 438. Though this case related to a private river, the rationes decidendi of the judgment are clearly applicable to the case of a tidal navigable river also.

2 *Mayor of Carlisle* v. *Graham*, L. R. 4 Ex. 361.

3 Hale de Iure Maris, p. 1. c. 5; Hargrave's Law Tracts, 11: *Neill* v. *Duke of Devonshire*, 8 App. Cas. (135) 172, *per* Lord Blackburn.

4 *Malcolmson* v. *O'Dea*, 10 H. L. C. (593) 618; *Neill* v. *Duke of Devonshire*, 8 App. Cas. (135) 178, *per* Lord Blackburn; Schultes' Aquatic Rights, 76-84. Doubts have quite recently been expressed in quarters of eminent authority as to the correctness of the interpretation put on the 16th chapter of the Magna Charta, by which the sovereign is thought to have been restrained from granting or appropriating exclusive fisheries in tidal waters. In *Neill* v. *Duke of Devonshire* (p. 177), Lord Blackburn said:—"And there seems to me, if it were res integra, considerable doubt whether the 16th chapter of the Magna Charta did more than restrain the writ de defensione ripariae, whereby when the king was about to come into a county, all persons might be forbidden from approaching the banks of the rivers, whether tidal or not, that the king might have his pleasure in fowling and fishing therein, a prerogative very analogous to the forest rights, (see the writ, Hargrave's Law Tracts, p. 7)." See also *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263, (in which the Court of Appeal entertained the same view); *Somerset* v. *Fogwell*, 5 B. & C 875.

several fishery in tidal waters be valid.—A claim, therefore, by a private individual to a several fishery over the foreshore of the sea and in tidal waters, to be valid in law, must be founded upon, and proved by, a charter, grant or royal appropriation made before Magna Charta, or upon prescription and immemorial enjoyment from which a grant or appropriation can be lawfully presumed to have been made before that epoch.[1]

But a grant of a several and exclusive fishery made by the Crown since Magna Charta is not always ineffectual. Law recognizes the validity of such grants if the several fishery had been appropriated by the Crown before Magna Charta,[2] or, having been created in favour of a private individual before Magna Charta, had come back into the possession of the Crown afterwards, by forfeiture or otherwise. "It is not law, and this can never be too often repeated," said Lord Blackburn in *Neill* v. *Duke of Devonshire*,[3] adopting the language of the Master of the Rolls in the same case before the Irish Court of Appeal, "that the Crown cannot grant a several fishery in tidal waters since Magna Charta. Such a statement is illusory and contrary to law. It can grant a several fishery in such waters since Magna Charta, if that fishery existed before Magna Charta. If a tidal river in which there was primâ facie a right in the public to fish was appropriated by an individual or by the Crown before Magna Charta, that individual or the Crown, if the Crown has got it back, can grant it after Magna Charta. That is a settled principle on which every one of the cases connected with the several fisheries in tidal rivers have been adjudicated upon in this country."[4]

Reversion to the Crown of a several fishery in tidal waters by forfeiture or otherwise.—A several fishery by reverting to the Crown by forfeiture or otherwise does not merge and cease to exist; for if the sovereign could himself acquire this right before Magna Charta, and continue to hold it afterwards, there is no valid reason why he should not be capable of holding it afterwards, if it came back to him.[5]

Modes in which a right to a several fishery in tidal waters

[1] Hale de Iure Maris, p. 1, c. 5; Hargrave's Law Tracts, 17-21; *Malcolmson* v. *O'Dea*, 10 H. L C. 593; *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135.

[2] *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135.

[3] 8 App. Cas. 135.

[4] *Neill* v. *Duke of Devonshire*, 8 App. Cas. (135) 180, *per* Lord Blackburn.

[5] *Neill* v. *Duke of Devonshire*, 8 App. Cas. (135) 179, *per* Lord Blackburn; *Northumberland (Duke of)* v. *Houghton*, L. R. 5 Ex. 127; *Rogers* v. *Allen*, 1 Camp. 310.

may be claimed by a subject.—As I said just now, a right to a several fishery in tidal waters may be claimed either by charter or express grant or by prescription. In either case, the burden, undoubtedly, is upon the claimant to establish affirmatively by clear and positive proof, either actual or presumptive, the acquisition of such a right in any of the modes which the law allows; because such a claim is in derogation of the right of the Crown, and the primâ facie right of the general public.[1]

Nature of proof requisite in each case.—If the claim is made under a charter or express grant, it will, of course have to be determined by the language of the instrument, taken in conjunction with the surrounding circumstances. But proof of such ancient grants, made in or before the reign of Henry II, it is not possible at this distance of time to adduce, either by documentary or parol evidence. Therefore, from the necessity of the case, the House of Lords, following the authority of Lord Hale, laid down in *Malcolmson* v. *O'Dea*[2], and *Neill* v. *Duke of Devonshire*,[3] the doctrine that such a claim to a several fishery could also be sustained by prescription. Willes, J., in the opinion which he delivered on behalf of the learned Judges, in the former case, thus explained the rule of law:—"If evidence be given of long enjoyment of a fishery, to the exclusion of others, of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to shew that its origin was modern; the result is, not that you say, this is a usurpation, for it is not traced back to the reign of Henry II, but that you presume that the fishery being reasonably shewn to have been dealt with as property, must have become such in due course of law, and, therefore, must have been created before legal memory."[4]

The qualification "and that there is nothing to show that its origin was modern" which restricts the rule laid down in the above passage, is most important and distinguishes at once this species of prescription from the other, according to which, under certain circumstances, an uninterrupted enjoyment of an easement for twenty years gives rise to a presump-

[1] *Fitzwalter's case*, 1 Mod. 105, *per* Lord Hale, C. J.; *Carter* v. *Murcott*, 4 Burr. 2162, *per* Lord Mansfield; *Reg* v. *Stimpson*, 4 B. & S. 301; Schultes' Aquatic Rights, 71.

[2] 10 H. L. C. 593. See also *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192.

[3] 8 App. Cas. 135.

[4] 10 H. L. C. 618. As to what may be sufficient evidence of a title by prescription see also; *Little* v. *Wingfield*, Ir. R. 8 C. L. 279; Ir. R. 11 C. L. 63; *Manual* v. *Fisher*, 5 C. B. N. S. 856; *O'Neill* v. *Allen*, Ir. R. 9 C. L. 132; *Holford* v. *George*, L. R. 3 Q. B. 639; *Edjar* v. *Commissioners of Fisheries*, 23 L. T. N. S. 732.

tion of a modern lost grant from one subject to another. In the case of prescription, such as would sustain a claim to a several fishery in a public navigable river, the presumption of a lost grant created since legal memory is excluded. "It will not do to prove thirty years' enjoyment of such a right, commencing at the beginning of the thirty years, or commencing at the beginning of any other epoch later than the end of the reign of Henry II; and for this reason, because as soon as you show that the origin was later than the time of Henry II, you negative the inference of a usage from that period, which inference is the foundation of the conclusion, that there was a grant as early as the reign of Henry II."[1]

Kinds of several fishery in tidal waters.—A several fishery in tidal waters may be either (i) in gross,[2] *i. e.*, as a personal right attaching to an individual or a corporation, (for, according to Lord Hale, many ecclesiastical establishments had such rights,) or it may be (ii) appendant or appurtenant[3] to a manor or to a naked freehold.[4]

Nature of each kind of several fishery.—As the Crown is the primâ facie owner of the soil of the foreshore of the sea as well as of all tidal waters, it might before Magna Charta have made a grant to a subject either of the soil and the fishery together, or of the soil alone, or of the fishery alone—the two rights being separable. Whether in any given case there is a grant of a several fishery at all, or if there is one, whether it exists with or without the ownership of the subjacent soil, will depend in general upon the construction of the ancient grants upon which the claim is based, as explained by evidence of subsequent possession and enjoyment.[5] There can be no doubt that grant of the soil alone will not entitle the grantee to exclude the public right of fishery, for the Crown itself could not have excluded the public right of fishery without an ap-

1 *Edgar* v. *Commissioners of Fishers*, 23 L. T. N. S. 732.

2 Hale de Iure Maris, p. 1, c. 5; Hargrave's Law Tracts, 18. The case of *Neill* v. *Duke of Devonshire*, 8 App. Cas. 185, also shows that some ecclesiastical corporations in Ireland possessed rights of fishery in gross. But instances of such fisheries owned separately from the ownership of manors or lands are, as Mr. Morris observes, extremely rare. The title to a fishery, according to him, is almost always shewn in connection with or as parcel of a manor. Hist. of the Foreshore, 747, (note q.)

3 Hale de Iure Maris, p. 1 c. 5; Hargrave's Law Tracts, 18; Hall on the Seashore (2nd ed.), 49; *Shuttleworth* v. *Le Fleming*, 19 C. B. N S. 702; *Rogers* v. *Allen*, 1 Camp. 305. Cf *Reg.* v. *Stimpson* 4 B. & S. 301.

4 *Hayes* v. *Bridges*, 1 R. L. & S. 390; Hall on the Seashore, (2nd ed.), 52.

5 Paterson's Fishery Laws, 20.

propriation or a grant of several fishery, and a grantee from the Crown certainly cannot claim a higher right.[1]

Nor, where the right to the soil and the right to the exclusive fishery in any portion of tidal waters exist together in the hands of a subject under a valid grant from the Crown, such as in the case of a several fishery in tidal waters appurtenant to a manor or freehold, will the transfer of the right to the soil, (unless there be express words in the conveyance) entitle the transferee to claim a right to the several fishery. The right to the several fishery will still remain in the person of the transferor as a several fishery in gross.[2] The proposition upon which this rule is, and must needs be, based is that, in tidal waters the right to an exclusive fishery is not of so ancillary and accessorial a character that it must necessarily follow the ownership of the soil as its principal.

Does the right to a several fishery in tidal waters raise any presumption as to the ownership of the subjacent soil?—If then in tidal waters the ownership of the soil does not primâ facie import a right to a several fishery, the question arises does the converse proposition hold good? Does a right to a several fishery in tidal waters raise a presumption that the owner of the fishery is also the owner of the soil? Notwithstanding the abolition of the technical rules of pleading to which it mainly owes its origin, the question still possesses a practical interest; for islets might arise or derelictions take place in tidal or non-tidal waters, in which a person owns a several fishery, and he might not be able to show any right to the soil by the production of any grant. In such cases he could still advance a claim to the islet or the derelict soil, if the presumption were held valid in law.

Granting for the sake of argument that, such a presumption as this might arise, the foundation for it must be sought in the assumption that a several fishery in tidal waters is incident to the ownership of the soil. But this, as I have already shewn, has been conclusively settled not to be the law in the case of tidal waters.

Passing from this inferential reasoning, the unanimous judgment of the King's Bench in *Duke of Somerset* v. *Fogwell*,[3] which has never yet been questioned, may be accepted as a direct authority for a negative answer to the question; although, no doubt, an observation occurs in it

[1] Hall on the Seashore (2nd ed), 54.

[2] *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135.

[3] 5 B. & C. 875; Hall on the Seashore, (2nd ed.), 62-66.

which seem apparently to militate against this view, but which, however, must evidently be restricted to the case of non-tidal waters. The result, therefore, is, that although, as a matter of fact, a several fishery in tidal waters is generally coupled with the ownership of the soil, there is no presumption that in such waters the one necessarily implies the other, whether the fishery be enjoyed by means of moveable apparatus, such as nets and hooks, or by engines fixed in the soil, such as weirs, stakes, &c.

Effect of shifting of the channel of a tidal navigable river upon the ownership of a several fishery.—If a tidal navigable river, in which a subject owns a several fishery under a grant from the Crown, suddenly changes its old channel and works a new channel for itself through the land of a private individual, then, in such a case, as "the right of the sovereign to grant a separate fishery in a tidal river, 'depends upon the existence of a proprietorship in the soil,'"[1] and as a sudden change in the course of a river does not take away the right of the private owner to the soil and vest it in the Crown, the right to the several fishery cannot be followed from the old to the new channel[2]; but it is otherwise, if the river shifts its course by slow and imperceptible degrees[3].

Mayor of Carlisle v. Graham.—Lord Chief Baron Kelly, in delivering the judgment of the Court in *Mayor of Carlisle* v. *Graham*[4], said:—"And we are called upon to decide the question which now arises for the first time,—Is the several fishery of a subject in a tidal river, the waters of which permanently recede from a portion of its course and flow into and through another course, where the soil and the land on both sides of the new channel thus formed belong to another subject transferred from the old to the new channel, and so a several fishery created in and throughout such new channel, or in some, and if in any, in what part of it? No authority has been cited at the bar nor is any to be found in the books to the effect that under such circumstances, a several fishery is extended into or created in the new channel thus formed in the tidal river.

"It is said in Rolle's Abridgment, and appears to have been remarked by Thorp, J., in a case in the Year Books, 23 Edw. 3, c. 93, that wherever the tide flows and reflows it may be called an arm of the sea, and if the

1 *Per* Lord O'Hagan, in *Neill* v. *Duke of Devonshire*, 8 App. Cas. (135) 157.

2 *Mayor of Carlisle* v. *Graham*, L. R. 4 Ex. 361.

3 *Foster* v. *Wright*, 4 C. P. D. 438.

4 L. R. 4 Ex. 361.

water be a highway and changes its course from one soil to another, still it becomes a highway there where the water flows, as it was before in its ancient course, so that the lord of the soil cannot disturb the waters in this new course. But this proposition, if true, as regards the use by the public of the tidal waters as a highway, or the exercise of any other public right, fails to shew that a private right to a several fishery arises within the new course of the tidal waters. In the case of *Murphy* v. *Ryan*[1], O'Hagan, J., in delivering the judgment of the Court, says, 'But whilst the right of fishing in fresh water rivers in which the soil belongs to the riparian owners is thus exclusive, the right of fishing in the sea, its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the Common law to be publici iuris, and so to belong to all the subjects of the Crown, the soil of the sea, and its arms and estuaries and tidal waters being vested in the sovereign as a trustee for the public. The exclusive right of fishing in the one case, and the public right of fishing in the other, depend upon the existence of a proprietorship in the soil of the private river by the private owner, and by the sovereign in a public river respectively.' And this is the true principle of the law touching a several fishery in a tidal river. If, therefore, the right of the Crown to grant a several fishery in a tidal river to a subject is derived from the ownership of the soil, which is in the Crown by the Common law, a several fishery cannot be acquired even in a tidal river if the soil belong not to the Crown but to a subject. And all the authorities, ancient and modern, are uniform to the effect that if, by the irruption of the waters of a tidal river, a new channel is formed in the land of a subject, although the rights of the Crown and of the public may come into existence and be exercised in what has thus become a portion of a tidal river or of an arm of the sea, the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public."

Free fishery in tidal waters.—A free fishery may also exist over the foreshore of the sea and in tidal waters. A right to this kind of fishery being very much similar to the right to a several fishery, the modes of origin and the incidents of this right do not materially differ from those of a several fishery.

[1] Ir. R. 2 C. L. 143, at p. 149.

It is obvious that there cannot be a common of fishery in tidal waters in which a public right of fishery exists.[1]

Restrictions upon the mode of enjoyment of a several fishery, or of the public right of fishery, in tidal waters.—The right of fishery in tidal waters, whether public or several, must be exercised in due subordination to the paramount interests of public navigation. Any act which interferes with or derogates from this right is unlawful. Thus, a demand by a private individual, without an adequate quid pro quo, (such as the maintenance of beacons and buoys for the safety of navigation), to take tolls from all vessels which cast anchor within the limits of his oyster fishery, has been held to be illegal, although there is in such a case a temporary occupation of his soil,[2] however trifling in extent.

Fishery in non-tidal rivers and streams—Right of fishery in such waters prima facie vested in the riparian owners—In non-tidal rivers, whether navigable or not, the right of fishing is primâ facie vested in the riparian owners, not in common, but in severalty, the right of each of such owner being co-extensive with his ownership of the subjacent soil of that portion of the bed which lies between his frontage and the middle thread of the stream.[3] And if the same person be the owner of lands on both sides of the river, the right of fishing therein primâ facie belongs to him exclusively, according to the extent of his riparian frontage.

"Fresh rivers of what kind soever," says Lord Hale, "do of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right, the propriety of the soil, and consequently the right of fishing, usque filum aquae; and the owners of the other side the right of soil or ownership and fishing unto the filum aquae on their side. And if a man be owner of the land of both sides, in common presumption, he is owner of the whole river, and hath the right of fishing according to the extent of his land in length."[4]

1 Hall on Profits à Prendre, &c., 307.

2 *Gann* v. *Free Fishers of Whitstable*, 11 H. L. C. 192; *Foreman* v. *Free Fishers of Whitstable*, L. R. 4 H. L. C. 285.

3 Hale de Iure Maris, p 1. c. 1; Hargrave's Law Tracts, 5; *Royal Fishery of the Banne*, Davies, 149; *Fitzwalter's case*, 1 Mod. 106; *Bickett* v. *Morris*, L R. 1 H. L. (Sc App.) 47; *Wishart* v. *Wyllie*, 1 Macq. H. L. 389; *Mayor of Carlisle* v. *Graham*, L. R. 4 Ex. 361; *Murphy* v. *Ryan*, Ir. R. 2 C. L. 413; *Cooper* v. *Phibbs*, L. R. 2 H. L. 165, *per* Lord Cranworth; *Pearce* v. *Scotcher*, 9 Q B. D. 162; Angell on Watercourses (7th ed.), §§ 61, 64, 65; Schultes' Aquatic Rights, 61; Woolrych on Waters (2nd ed.), 122.

4 Hale de Iure Maris, *Ibid.*

Foundation and nature of the right.—The right of fishing in non-tidal rivers is not a riparian right, which, as I have already pointed out in a previous lecture,[1] arises out of the lateral contact of land with the flow of water,[2] and not out of the ownership of the soil of the bed of the stream. It is—as the words "and *consequently* the right of fishing", in the passage I have just read from Lord Hale, taken in connection with the previous context, prove—a fragment of the proprietary interest in the subjacent soil, a mode of enjoyment of, or a kind of profit issuing from, land, when it happens to be covered with water, and may be transferred or appropriated either with or without the property in the bed or bank to another person, whether he does or does not own land on the borders of, or adjacent to, the stream.[3] When this right exists in concomitance with the ownership of the soil, it may aptly be described as predial or territorial fishery.[4] When it is severed from it and transferred to another, so that the right of fishing alone exists in one person, and the ownership of the soil subject to this right exists in another, it is called a profit à prendre.

Enumeration of the different kinds of right of fishery in such waters.—There may be a several fishery, free fishery and common of fishery as well in non-tidal waters and streams, as in tidal waters.

Ambiguity of the term 'several fishery,' when applied to non-tidal waters.—The term 'several fishery,' as applied to non-tidal waters, has a double signification. It is used sometimes to denote that exclusive right of fishing which is incidental to, and is a component part of, the ownership of the soil,—the territorial fishery, as it is more correctly designated; and sometimes to refer to the exclusive right of fishing granted by the owner of the soil to a stranger independently of any proprietary interest in the soil—a mere profit à prendre.

Modes n which a several fishery in such waters may be created.—A several fishery in non-tidal waters may be claimed by grant or by prescription.

Does the right to a several fishery in non-tidal waters raise any presumption as to the ownership of the subjacent soil?—A several fishery in non-tidal waters being a right of an accessorial character and incident to the ownership of the soil, there is a presumption in law, until the

[1] *Supra*, 257—260.

[2] *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662.

[3] Hale de Iure Maris, p. 1, c. 1; Hargrave's Law Tracts, 5; Schultes' Aquatic Rights 38, 39; *Marshall* v. *Ulleswater Steam Navigation Co.*, 3 B. & S. 732; *Bristowe* v. *Cormican*, 3 App. Cas. 665.

[4] Schultes' Aquatic Rights, 87; Woolrych on Waters, (2nd ed.), 113.

contrary is shewn, that the owner of the soil is also the owner of the several or exclusive fishery in the water which covers the soil. But the question whether the converse of this proposition, namely, whether the right to a several fishery carries with it a presumption that the owner thereof is also the owner of the subjacent soil, is true or not, has been the subject of much controversy amongst the earlier as well as the more modern authorities. The earlier authorities laid down that the ownership of the soil was absolutely essential to the existence of a several fishery in private waters. But this position has been assailed with much acuteness and considerable learning by Mr. Schultes,[1] followed in this respect by Serjeant Woolrych; and it is now admitted on all hands, that a several fishery may exist independently of the ownership of the soil in the bed of the water.[2]

But, though it is unquestionable that the right of fishery may be dissociated from the right to the soil, and may be transferred to another, as a mere incorporeal right, the preponderance of authority in England is in favour of the doctrine that the right to a several fishery in non-tidal waters primâ facie imports the ownership of the soil. In the case of *Holford* v. *Bailey*,[3] Lord Denman, C. J., in delivering the considered judgment of the Court of Queen's Bench, said: "No doubt the allegation of a several fishery, primâ facie, imports ownership of the soil though they are not necessarily united." And the same doctrine was enunciated by Parke, B., in delivering the judgment of the Court of Exchequer Chamber in the same case.

The authority of this case was followed by the Court of Queen's Bench in *Marshall* v. *Ulleswater Steam Navigation Co.*,[4] where the same question was raised and the earlier cases were very fully discussed at the bar. In that case the grant of a several fishery was accompanied by livery of seisin, and it reserved a certain quit-rent to the then lord of the manor. The majority of the Court, Wightman and Mellor, JJ., held that a right to the soil passed by the grant, inasmuch as a feoffment with livery of seisin, and the reservation of a quit-rent were not at all appropriate to

[1] See the ancient authorities collected in Hargrave's notes upon Co. Litt. 122 (b) n. 7; Schultes' Aquatic Rights, 44-46; Woolrych on Waters (2nd ed.), 114-116, with the author's comments thereon.

[2] *Holford* v. *Bailey*, 8 Q. B. 1000; 13 Q B. 426 (in error); 16 L. J. Q. B. 68; 18 L. J. Q. B. 109; *Marshall* v. *Ulleswater Steam Navigation Co.*, 3 B. & S. (732), 747, *per* Lord Cockburn, C. J.

[3] 8 Q. B. (1000), 1016.

[4] 3 B & S. (732), 747-748.

the transfer of an incorporeal right.[1] Cockburn, C. J., however, though acquiescing in the judgment of the majority, in consequence of the weight of authorities by which he felt himself bound, was himself of opinion that, both according to reason and principle, a right to a several fishery did not import a right to the soil. His Lordship thought that the livery of seisin and the reservation of a quit-rent could be explained on the ground that they had been made by the parties under a mistake of law. After citing the opinion of Lord Coke to the effect that, upon a grant of a several fishery, even when accompanied by livery of seisin, the soil does not pass, his Lordship thus proceeds to observe:—"Now independently of the high authority of Lord Coke on such a matter, I must say that this doctrine appears to me the only one which is reconcileable with principle or reason. It is admitted on all hands that a several fishery may exist independently of the ownership of the soil in the bed of the water. Why then should such fishery be considered as carrying with it, in the absence of negative proof, the property in the soil? On the contrary, it seems to me that there is every reason for holding the opposite way. The use of water for the purpose of fishing is, when the fishery is united with the ownership of the soil, a right incidental and accessory to the latter. On a grant of the land, the water and the incidental and accessory right of fishing would necessarily pass with it. If, then, the intention be to convey the soil, why not convey the land at once, leaving the accessory to follow? Why grant the accessory that the principal may pass incidentally? Surely such a proceeding whould be at once illogical and unlawyer-like. The greater is justly said to comprehend the less, but this is to make the converse of the proposition hold good. A grant of land carries with it as we all know, the mineral, which may be below the surface, But whoever heard of a grant of the mineral carrying with it the general ownership of the soil? Why should a different principle be applied to the grant of a fishery, which may be said to be a grant of that which is above the surface of the soil, as a grant of the mineral is a grant of that which is below it? Nor should it be forgotten that the opposite doctrine

[1] See, however, an article in 5 Q L. Review, 29, in which the learned writer quotes several earlier authorities to show that feoffment and livery of incorporeal hereditaments were possible just as far as, though no further than, feoffment and livery of corporeal hereditaments. See also a criticism on this article in the same volume of the Q. L. Review on p. 218, and a reply to it by the writer of the original article on p 328.

involves the startling and manifest absurdity that should the water be diverted by natural causes or become dry, the fishery, which was the primary and principal object of the grant, would be gone, and the property in the soil which only passed incidentally and as accessory to the grant of the fishery, would remain."

In the Irish case of *Bloomfield* v. *Johnson*,[1] Baron (now Lord) Fitzgerald went further than this and in a very learned judgment expressed his opinion that the grant of a several fishery by the owner of the soil, even if accompanied by livery of seisin, would not pass the soil.

The presumption that the owner of a several fishery is primâ facie the owner of the soil, obtains only when the terms of the grant are unknown, for if the grant shows that an incorporeal hereditament was intended to pass, the presumption ceases.[2]

Several fishery in one, subject to a limited right in another.—Although a several fishery is by its nature exclusive, so that no other person can have with the owner of such a fishery a co-extensive right therein, yet it has been held that a partial independent right in another, or a limited liberty does not derogate from the right of the general owner. Thus, when the owner of the soil granted a several fishery with the exception of an oystery, and reserved to himself the right to take fish for the supply of his own table, the grant was held to be that of a several fishery.[3]

Free fishery in non-tidal waters.—A free fishery in non-tidal waters —sometimes used synonymously with a common of fishery—is, as I have said before, a right of fishing in a particular place co-extensive with others; that is to say, it may exist in the owner of the soil in conjunction with a stranger, or in two or more strangers to the exclusion of the owner of the soil.[4]

A free fishery has been held not to import ownership of the soil.[5]

Franchise fishery in non-tidal waters.—Another kind of fishery, namely, a franchise fishery in non-tidal rivers, similar to a franchise

[1] Ir. R. 8 C. L. (68) 105.

[2] *Duke of Somerset* v. *Fogwell*, 5 B. & C. (875) 886.

[3] *Seymour* v. *Lord Courtenay*, 5 Burr. 2814. Cf. *Holford* v. *Pritchard*, 3 Ex. 793; *Bird* v. *Higgenson*, 2 A. & E. 696.

[4] *Bloomfield* v. *Johnson*, Ir. R. 8 C. L. (68) 107, *per* Fitzgerald, B.; *Carter* v. *Murcott*, 4 Burr. 2162; *Smith* v. *Kemp*, 2 Salk. 637; *Seymour* v. *Lord Courtenay*, *supra*; Woolrych on Waters (2nd ed.), 122-123; Schultes' Aquatic Rights, 67.

[5] *Bloomfield* v. *Johnson*, *supra*.

fishery in tidal navigable rivers, discussed before at some length,[1] was attempted to be established in a very recent case[2] which came before the Court of Appeal. It was argued that prior to Magna Charta, the Crown could, as part of its prerogative, have an exclusive right of fishery not only in tidal navigable rivers, but also in those rivers which are above the flow of the tide, and the soil whereof belonged to a subject; and further, that it could also, before that period, grant such a right of fishery to a subject so as to be a franchise in his hands. But upon an examination of the forms of writ in relation to the defence of rivers given in Lord Hale's treatise De Iure Maris, the Lords Justices were of opinion that all that they seemed to establish was "that prior to the Great Charter of Henry III, the king had exercised as part of his prerogative a right to cause various rivers, including fresh rivers above the flow of the tide, to be put in defence, *i. e.*, to be kept close, in anticipation of a visit of the king for the purpose of fishing in the river, and further that he required certain men, who were anciently liable to perform the duty, to make preparations for his arrival by the construction of bridges; that this prerogative was exercised by means of a writ addressed to the sheriff requiring him to put the river in defence, and that after Magna Charta the prerogative was still exercised, but only in regard to rivers which had been put in defence in the reign of Henry II."

"But assuming" the Lords Justices went on to observe "this prerogative to have existed, we entertain serious doubts on the following questions:—first, whether the prerogative would have authorized the king to close the river against the owner of the soil or to assert any right in the river, except in preparation for a royal visit; second, whether the prerogative was not of a purely personal character, existing only for the pleasure of the king and his court, and consequently whether the prerogative could be granted by the king so as to become a franchise in the hands of a subject; and thirdly, if it could be held by a subject as a franchise, whether it could confer on the subject a permanent right to fish to the continual exclusion of the owner of the soil."

Effect of shifting of the channel of a non-tidal river upon the right of fishery.—The question whether upon an alteration in the course of a non-tidal river, the right of fishery follows the new channel, depends, as in the case of tidal rivers, upon the nature of the change by which the new channel is effected. In the river shifts its channel by gradual

[1] *Supra*, 354—355. [2] *Duke of Devonshire* v. *Pattinson*, 20 Q B. D. (263) 271, 272.

and imperceptible degrees, the right of fishery continues in the channel; but if, on the other hand, the new channel is the result of a sudden and violent encroachment of the river, then, unless the encroachment be upon the land of the person who is also the owner of the former bed, the right of fishery cannot be exercised in the new channel. The reason which underlies this rule is, that in the case of a territorial fishery, a slow and imperceptible encroachment by the river upon the land of an adjoining owner (though the extent of the encroachment may be ascertainable after the lapse of several years), transfers, according to the law of alluvion, his proprietary right in the soil to the owner of the original bed of the river, to whose territory it becomes annexed, and over which his fishery consequently extends; but that when the encroachment is sudden and manifest, the law of alluvion produces no change whatever in the ownership of the soil. The same reason equally applies if the fishery be an incorporeal franchise or right, because being dependent for its enjoyment upon the subsistence of the proprietary right of the grantor, actual or presumptive, of the franchise or right in the subjacent servient soil, it does or does not continue in the new channel, according as such grantor does or does not acquire, under the law of alluvion, the ownership of its soil, by reason of the channel being caused by the gradual or sudden action of the river.

Foster v. Wright.—The rule that a territorial fishery in a non-tidal river shifts with the changes in its course, where such changes take place by slow and insensible degrees by the river encroaching upon the soil of an adjoining landowner, is established by the decision of the Court of Appeal in *Foster* v. *Wright*.[1] In that case, the plaintiff who was lord of a certain manor, and was entitled to the right of fishery in a river running through it, had enfranchised in favour of the defendant some land of the manor lying close to, but not adjoining, the river. The river gradually wore away the bank and the strip of land that lay between the lands of the manor next to the bank and the defendant's land, and eventually encroached upon the latter by gradual and imperceptible degrees, though the extent of the encroachment was ascertainable and in fact ascertained at intervals of twelve years. The defendant having fished in that portion of the river which covered what was originally defendant's own land, the plaintiff brought an action of trespass. The Court held the defendant liable on the ground that, the gradual encroachment

[1] 4 C. P. D. 438.

by the river had the effect of annexing the soil of the defendant to the soil of the plaintiff, and, therefore, of excluding his right of fishery over it.

Restrictions upon the exercise of the right of fishery in those non-tidal rivers that are navigable.—In those non-tidal rivers in which the public has acquired a right of navigation by grant or prescription or Act of Parliament, the right of fishery must be exercised in due subordination to such paramount right, and any interference therewith is a nuisance and is indictable.[1]

Obstruction to the passage of fish.—For similar reasons, the owner of a right of fishery must not erect weirs or other engines so as to obstruct the passage of fish up a river into the fisheries of other persons, because it amounts to a clear invasion of their right, and is therefore actionable.[2] But it would seem that a right to a weir may be acquired under the English Prescription Act, by enjoyment thereof for the statutory period.[3]

The erection of dams or other similar structures, in non-navigable rivers for mill purposes, in so far as they obstruct the passage of fish, has, in several of the states in America, been long regulated by positive legislation, and the only available remedy in case of such obstructions is that provided by statute. There the mill-owners are required to keep fishways in such dams.[4]

[1] Hale de Iure Maris, p. 1, c. 2; Hargrave's Law Tracts, 8; *Williams* v. *Wilcox*, 8 A. & E. 333. See *Orr Ewing* v *Colquhoun*, 2 App Cas. 839

[2] *Weld* v. *Hornby*, 7 East 195; *Leconfield* v. *Lonsdale*, L. R. 5 C. P. (691) 726, *per* Bovill, C J.

[3] *Rolle* v. *Whyte*, L. R. 3 Q B. 286.

[4] Gould on Waters, § 187.

LECTURE XIV.

FISHERY.—(*Continued.*)

III (b). Fishery in navigable rivers—Under Roman law, right to fish in perennial rivers common to the public,—Appropriation by the sovereigns in feudal times of the right to fish in navigable rivers—Right of the public to fish in navigable rivers rehabilitated in France by the Code Napoleon—Right also recognised in some of the states in America—In India, right of fishing in navigable rivers primâ facie belongs to the public—Mode of enjoyment of such right—Exclusive fishery claimable by private individuals by grant from Government or by prescription—Nature of evidence requisite to prove acquisition of such exclusive right—Whether exclusive right of fishery in a navigable river imports a right to the subjacent soil—Effect of shifting of, or of any other change in, the channel of a navigable river upon the exclusive or the public right of fishery in the river—Course of decisions upon this topic in Bengal—Remarks—Fishery in non-navigable rivers or streams —Right of fishing in such rivers or streams primâ facie vested in the owner of the subjacent soil—Distinction between territorial and incorporeal fishery in non-navigable stream—Modes of acquisition of incorporeal fishery—To whom does the right of fishery in non-navigable streams flowing between two estates, primâ facie belong?—Whether exclusive right of fishery in a non-navigable stream imports a right to the subjacent soil—Modes of determining the right to the soil under different circumstances—Right of the grantee of the entire julkur of a pergunnah—Obstruction to the passage of fish—Fishery in lakes and ponds—Right of fishing in small lakes, ponds, &c. primâ facie belongs to him in whose lands they are situated—Right of fishing in large non-tidal navigable lakes, under English law—Under American law—Right of fishing in lakes, ponds, &c. generally, according to Anglo-Indian law—Sums annually payable under a lease of a fishery, whether rent or not—Right of occupancy in respect of the julkur of a stream, &c.

B. Topics relating to rights of fishery in general—Whether a right to compensation exists for loss of right of fishery, when subjacent soil is acquired for public purposes—Whether the English Prescription Act applies to right of fishery in gross—Provisions of the Indian Limitation Act and the Easements Act respectively regarding right of fishery in gross—A fluctuating body of inhabitants of a vill, parish, or a borough cannot by custom claim a right—First reason for the rule—Second reason—Comments on the second reason—*Goodman* v. *Mayor of Saltash*—*Lutchmiput Singh* v. *Sadaulla Nashayo.*

C. Remedies for disturbance of right of fishery (i) Civil action—(ii) Criminal proceedings—Roman law regarding feræ naturæ—General principles of law regarding the same topic —Provisions of the English Common law—*Blades* v. *Higgs*—Liability of a trespasser for capture of feræ naturæ 24 and 24 Vict. c. 96, s. 24—Summary of the decisions upon the section—Anglo-Indian law regarding feræ naturæ—Cases in which capture of fish does not constitute any offence under the Indian Penal Code—Act II of 1889 (B C.) —Section 145 of the Criminal Procedure Code, how far applicable to rights of fishery.

III (b). Fishery in navigable rivers Under Roman law, right to fish in perennial rivers common to the public.—By the Roman law, all

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perennial rivers,[1] whether navigable or not,[2] were deemed public,[3] and the right of fishing therein common to all persons.[4]

Appropriation by the sovereign in feudal times of the right to fish in navigable rivers.—But in subsequent times, when Europe began to be feudalized, some of the princes on the continent appropriated to themselves this privilege to the exclusion of their subjects, and none were permitted to fish in navigable rivers except those that had obtained a license from the Crown, by paying tribute. From this source large emoluments were derived, and they were regarded as part of the regalia of the Crown.[5]

"The right of fishery" says Vinnius, "originally belonged to the people, from them it passed to the princes: so that no one can in these days exercise that right without a grant from the prince, (such grant being) confined within certain limits, and subject to certain regulations."[6] He proceeds to add, however, that, it is lawful even now for individual citizens to fish with an angle in navigable rivers or lakes.[7]

Right of the public to fish in navigable rivers rehabilitated in France by the Code Napoleon.—This was also the state of the law in France before the revolution. The right of fishery, in navigable as well as non-navigable rivers, was vested exclusively in the king, and those individuals that possessed seignorial rights under him.[8] But the Napoleonic Code, which was framed after these odious feudal rights had been abolished by several decrees of the revolutionary governments, declared all navigable rivers and 'flottables' streams to be the property of the state, and the right of fishing therein open to the public, though such right was to be exercised subject to the control of particular laws.[9]

[1] Dig. xliii. 12. 1. 3. [2] Dig. xliii. 13. 1. 2. *Cf.* Dig. xliii. 12. 2.

[3] Dig i. 8. 4. 1; Inst. ii. 1. 2.

[4] Flumina autem omnia et portus publica sunt: ideoque ius piscandi omnibus commune est in portus fluminibusque. Inst. ii. 1. 2. This is not quite correct, as according to Roman law perennial rivers alone were public. In the Digest we find it more accurately laid down thus: "sed flumina *paene* omnia et portus publica sunt." Dig. i. 8. 4. 1.

[5] 2 Domat, Civil Law (trans. by Strahan), 383; Bk. 1. t. 8. s. 1. § 2; Schultes' Aquatic Rights, 5, 6.

[6] Ius piscandi quoque initio penes populum fuit, inde ad Principes translatum: ut nemo iam id iuris habeat, nisi concessu Principis, et certis limitibus ac legibus circumscriptum. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De Fluminibus, &c.

[7] Et singulis civibus etiamnum ius est in flumine aut lacu navigabili hamo piscari. Vinnius, Comm. ad Inst. *Ibid.*

[8] Schultes' Aquatic Rights, 98; 3 Kent, Comm., 414.

[9] Code Napoleon, §§ 538, 715.

Right also recognised in some of the states of America.—Coming down to more recent times, we find that in several of the states in America, notably in Pennsylvania and in North and South Carolina, which have repudiated the doctrine of the English Common law, with regard to the ownership of the beds of tidal rivers, the right of fishing in navigable rivers, far above the flux and reflux of the tide, has always been held to be primâ facie vested in the state for the common benefit of all the members of the public, though, at the same time, the power of the legislature of a state to regulate and control the time and the mode of enjoyment of this common privilege, as well as to grant exclusive rights of fishing to private individuals, has, according to the undoubted weight of authority in that country, been also acknowledged.[1]

In India, right of fishing in navigable rivers prima facie belongs to the public.—In India, the right of fishing in navigable rivers, in those cases in which the bed forms part of the public domain, and does not constitute the property of any private individual, belongs primâ facie to all the members of the public.[2] In most of the cases which relate to this matter, the doctrine has doubtless been enunciated in terms which seem at first sight to raise the inference that this general right may be asserted in those rivers alone that are both tidal and navigable; but if the conclusions with regard to the ownership of the beds of navigable rivers, whether they be tidal or non-tidal, to which the discussions in the third lecture have led us, be accepted as sound, then the circumstance that in those cases the rivers also happened in fact to be tidal, must be treated as wholly immaterial.

Mode of enjoyment of such right.—This public right must, however, be exercised in a reasonable manner, and subject to such regulations as may be essential to secure due enjoyment of the right by all the members of the public.[3] If any local custom as to the mode of enjoyment of the

[1] 3 Kent, Comm., 418; Angell on Watercourses (7th ed.), §§ 65a, 548, 549; Gould on Waters, §§ 182, 189, and the cases cited therein; Houck on Navigable Rivers, §§ 220-224.

[2] *Horidas Mal* v. *Mahomed Joki*, (F. B.), I. L. R. 11 Cal. 434; *Viresa* v. *Tatyya*, I. L. R. 8 Mad. 467; *Prosunno Coomar Sircar* v. *Ram Kumar Parooey*, I. L. R. 4 Cal. 53; *Baban Mayacha* v. *Nagu Shravucha*, I. L. R. 2 Bomb. 19; *Gureeb Hossein Chowdhry* v. *Lamb*, Cal. S. D. 1859, p. 1357; *Bagram* v. *Collector of Bhullooa*, Suth. W. R. 1864, p. 243; *Collector of Rungpur* v. *Ram Jadub Sen*, 2 Sev. 373; 1 R. C. Cr. R. 174.

[3] Cf. *Baban Mayacha* v. *Nagu Shravucha*, I. L. R. 2 Bomb., 19; *Viresa* v. *Tatyya*, I. L. R. 8 Mad., 467.

right is established, it must be exercised in the manner sanctioned by such custom.[1]

Exclusive fishery claimable by private individuals by grant from Government or by prescription.—It may now also be taken to be conclusively settled that Government in this country may derogate from this public right or privilege by creating exclusive rights of fishery in navigable rivers in favour of private individuals; and that such exclusive rights may be established either by proof of direct grant from Government or by prescription,[2] or by proof of enjoyment for such length of time as would suffice for the acquisition of a right to an easement, (which expression, both under Act XV of 1877[3] and Act V of 1882,[4] includes a profit à prendre) against the Crown.[5]

Nature of evidence requisite to prove acquisition of such exclusive right.—Such grants, being in their nature restrictive of the rights of the Crown and of the public, must be established by clear and conclusive evidence.[6] A right of fishery in a navigable river, unless expressly mentioned in the grant or the settlement *dol,* does not, as laid down in a

[1] *Narasayya* v. *Sami*, I. L. R. 12 Mad., 43, (where the custom was proved to have been only 30 years old).

[2] See cases collected in note 2 on p. 370, *supra.* See also *Collector of Maldah* v. *Syud Sudoorooddin*, 1 Suth W. R. 116; *Hamid Ali* v. *Krista Mohun Jalia*, S. C. C. Ref. No. 8 of 1882 (unreported). *Chunder Jaleah* v. *Ram Churn Mookerjee*, 15 Suth. W. R. 212; *Achumbit Jha* v. *Jearun*, 11 Cal. L. R. 9. See also s. 151 of Act XVIII of 1881 (An Act to consolidate and amend the law relating to land-revenue and the powers of Revenue officers in Central Provinces), which contains a distinct recognition by the legislature, at least so far as regards the Central Provinces, of the right of Government to make exclusive grants of fisheries in navigable rivers in favour of private individuals.

[3] See definition of 'easement' in the Act, s. 3.

[4] See definition of 'easement,' and of the expression 'to do something,' in s. 4. An examination of those sections will show that Act V of 1882 includes only what in the phraseology of English law is called 'profit à prendre appurtenant or appendant,' while Act XV of 1877 includes this as well as profit à prendre in gross.

[5] *Viresa* v. *Tatyya*, I. L. R. 8 Mad. 467. According to this case, exclusive enjoyment of a fishery in a tidal navigable river for a period of 60 years creates an exclusive right. But this is apparently founded upon a provision (s. 15, last para.) in the Indian Easements Act (V of 1882), which applies to Madras, Coorg and the Central Provinces, and, since the passing of Act VIII of 1891, to Bombay, North-Western Provinces and Oudh. The general Limitation Act (XV of 1877), s. 26, does not provide any period of time for the acquisition of an easement as against the Crown. It is doubtful whether this Act applies to profits à prendre in gross.

[6] *Bagram* v. *Collector of Bhullooa*, Suth. W. R. 1864, p. 243; *Gureeb Hossein Chowdhry* v. *Lamb*, Cal. S. D. 1859, p. 1357; *Prosunno Coomar Sircar* v. *Ram Kumar Parooey*, I. L. R. 4 Cal. 53.

somewhat early case, pass under the general words;[1] nor does a mere recital in quinquinneal papers that a person is the owner of julkur (fishery) rights in a zemindari, permanently settled with him by Government, give such person a right of fishery in a navigable river.[2]

But the view entertained by the majority of the learned Judges (Garth, C. J., Mitter and Tottenham, JJ.) in the recent Full Bench case of *Hari Das Mal* v. *Mahomed Jaki*[3] appears to be that, in ascertaining the boundaries of a grant of exclusive fishery, in a navigable river, or the nature of the rights of fishery confined within those boundaries,—whether they be rights of fishery in a navigable river, or merely in small streams and lakes,—the Courts should be guided by the same rules of evidence as would be applicable for the purpose of determining the nature and extent of any other grant.[4] Prinsep and Pigot, JJ., however, expressed a different view and held that nothing short of a grant in express terms would be sufficient.

Whether exclusive right of fishery in a navigable river imports a right to the subjacent soil.—It is quite obvious that the mere grant of an exclusive right of fishery in a navigable river cannot per se import a right to the soil of its bed, when dereliction takes place, or the river happens to shift its channel. The negative of this position has been occasionally contended for in the case of the non-navigable rivers and lakes, and to this I shall presently advert; but so far as the proposition relates to navigable rivers, it seems to be so clear, that no question with regard to it appears to have ever been mooted in any of the reported cases.

Effect of shifting of, or of any other change in, the channel of a navigable river upon the exclusive, or the public right of fishery in the river.—If a navigable river shifts its course by slow and imperceptible degrees, the owner of an exclusive right of fishery in the old channel, or even the public, where no such exclusive right exists, may, reasoning by analogy from Regulation XI of 1825, be held entitled to exercise the right of fishing in the new channel.[5] But the well-established doctrine of Anglo-Indian law, namely, that the submerged site, unless the right thereto is expressly or impliedly abandoned, continues to be the property of the

1 *Collector of Jessore* v. *Beckwith*, 1 R. C. & Cr. 243; 5 Suth. W. R. 175.

2 *Prosunno Coomar Sircar* v. *Ram Coomar Parooey*, I. L. R. 4 Cal. 53.

3 I. L. R. 11 Cal. 434.

4 The view taken by the majority of the Court is in consonance with the rule laid down by the Privy Council in *Lord* v. *Commissioners of Sydney*, 12 Moo. P. C. C. 473, for the construction of Crown grants.

5 *Maharani Shibessury Dabi* v. *Luckhy Dabi*, 1 Suth. W. R. 88.

original owner, would compel us to doubt very much, (whatever might be the rule in England,[1] where no such doctrine prevails), whether in this country, either the exclusive right of the individual, or the general right of the public, to fish, could be followed into the new channel, if it formed wholly on the identifiable site of an estate belonging to a private person; or, if a portion of the old channel underwent a change, so that it covered the recognizable site of some private estate, into any such portion thereof. If in such cases the site, notwithstanding its submersion, remains the property of the former owner, the right of fishing in the water which covers the site, ought also, according to reason and principle, to belong to him.

It has been decided by the Calcutta High Court in a somewhat early case,[2] (which decision, it is worthy of note, is quite in harmony with the judgment of the English Court of Exchequer in the somewhat analogous case of *Mayor of Carlisle* v. *Graham*),[3] that if a definite and ascertainable area is submerged at once by the sudden irruption of the waters of a river, the owner of an exclusive right of fishery in the river is not entitled to extend that right over the area so submerged.

The principle upon which the Court acted in this case indicates a clear recognition of the doctrine that, the proprietor of a piece of land is exclusively entitled to fish in the water which rests or flows over it, so long as his ownership of the soil continues. The ownership of an ascertainable and ascertained site, undoubtedly, according to the law of this country remains in the former proprietor, whether it be overwhelmed by a sudden inundation or diluviated by the slow and gradual introcession of a river; and, if in the one case, the owner of the site has the exclusive right of fishing in the waters which happen to cover it, there is apparently no valid reason why in the other he should not possess the same right also.

It may, perhaps, be objected that this view of the law, however unassailable in theory, is likely to present sometimes serious practical difficulties, such as where different portions of the new river-bed occupy

[1] *Foster* v. *Wright*, 4 C. P. D. 438.

[2] *Maharani Shibessury Dabi* v. *Luckhy Dabi*, 1 Suth. W. R. 88. But it has been held by the Calcutta High Court in a very recent case, *Tarini Churn Sinha* v. *Watson & Co.* (I. L. R. 17 Cal. 963) that, if a public navigable river shifts a portion of its channel and occupies the land of a private individual, the grantee of an exclusive fishery in the river from Government is entitled to exercise his right in the portion of the channel newly formed, even though such new channel may have been the result of a sudden change in the river.

[3] L. R. 4 Ex. 361.

sites belonging to different individuals. In such case, no doubt, the only equitable solution would be to apportion the fishery in the channel of the river among the owners of the various sites. But the difficulty involved in this process is scarcely so insurmountable as to justify the subversion or confiscation of one of the ordinary incidents of territorial ownership.

Current of decisions upon this topic in Bengal.—Directly opposed to the view which I have just attempted to explain, is the rule laid down in a long series of decisions pronounced by the Calcutta Sudder Dewanny Adawlut, and subsequently by the High Court, that if a river (whether navigable or otherwise, is perhaps immaterial, as no such distinction appears to have been relied upon in these cases) has arms or inlets;[1] or, by flooding adjoining lands belonging to third persons, causes lakes or *beels* to be formed therein;[2] or shifts its course leaving such lakes or other pieces of water in its old bed,[3] the grantee of a general right of fishery in the river, is primâ facie, if there be no express words in the grant to the contrary defining the limits, entitled to fish not only in the main channel of the river, but also in all such arms, inlets, lakes or *beels*, so long as any communication between them and the main channel remains open during all seasons of the year; barring, of course, such lakes, &c., as are not actually connected with the channel, but are occasionally supplied by the overflowings of the river.[4]

Remarks.—It is apprehended that this rule trenches upon one of the universally recognized incidents of territorial proprietorship. If the ownership of land involves as its essential ingredient, under the law of this country,[5] as it doubtless does, under English law,[6] and perhaps under almost every other civilized system of law, the right to fish in the

[1] *Uchchodanund Gossain* v *Nubo Kishore Roy*, Cal. S. D. 1856, p. 878.

[2] *Krishnendra Roy Chowdhry* v. *Maharani Surnomoyee*, 21 Suth. W. R. 27; *Kalee Soonder Roy* v. *Dwarka Nath Mazumdar*, 18 Suth. W. R., 460.

[3] *Gray* v. *Anund Mohun Moitra*, Suth. W. R. 1864, p. 108; *Hureehur Mukerjee* v. *Chandi Charan Dutt*, Cal. S. D. 1858, p. 641.

[4] *Uchchodanund Gossain* v. *Nubo Kishore Roy*, Cal. S. D. 1856, p. 878; *Gopee Nath Roy* v. *Ram Chunder Tarkalankar*, 1 Sel. R. 228; *Gray* v. *Anund Mohun Moitra*, Suth. W. R. 1864, p. 108; *Roma Nath Thakoor* v. *Eshan Chunder Banerjee*, 2 Sev. 463, (it was suggested in this case that if the right of fishery had been exercised over this disconnected piece of water from the time of the Permanent Settlement, the right would have been sustained).

[5] Cf. *Forbes* v. *Mir Mahomed Hossain*, 12 B. L. R. 210, (P. C.); 20 Suth. W. R. 44.

[6] Cf. *Murphy* v. *Ryan*, Ir. R. 2 C. L. 68; *Neill* v. *Duke of Devonshire*, 8 App. Cas. 135, *per* Lord O'Hagan.

water which rests on it, it seems rather difficult to conceive how this right is lost when such water merely happens to be connected with an adjoining river or stream in which another person owns an exclusive right of fishery. Indeed, in one of the later cases[1] on the subject, one of the learned judges expressed grave doubts as to the soundness of the doctrine, to which I have just referred, but he was not able to give effect to his opinion, as he considered himself fettered by the previous authorities. The rule laid down in these cases is in point of fairness open to exception, and I do not suppose they will be stretched farther in aid of any such broad contention as that the public at large also has a right to fish in lakes, *beels* and swamps situated in private estates, whenever there happens to exist any communication between them and the channel of a navigable river, in which the right of fishing is common to all.

The serious hardship and injustice which the doctrine involves becomes, it is conceived, clearly apparent when you come to examine the converse case. Suppose, a lake is situated entirely within the limits of an estate on the borders of which flows a river. During one of its annual floods the river overflows its banks, and when the water subsides, a permanent connection is observed to have been established between the lake and the river by means of a narrow inlet—a thing not very unusual in the countries lying in the Gangetic delta. Does the owner of the lake who had all along before this change enjoyed his exclusive right of fishing therein, lose it in favour of an individual who may happen to possess an exclusive right of fishery in the river or in favour of the general public, (if the river be a navigable river)? Assuredly not. And yet nothing short of an affirmative answer to this question will satisfy the requirements of the rule we have just been discussing.

In a case,[2] decided by the Calcutta High Court, where a riparian owner was declared by the Magistrate to be in possession of a piece of land as an accretion to his estate, but which, in fact, used to be covered with water during the floods, and remain open to the traffic of boats for a good portion of the year, the owner of a julkur or of an exclusive right of fishery in the main channel was held entitled to fish also in the waters which flowed over this land. This ruling too is somewhat irreconcileable with the view already stated, as to the basis of the rights of fishing, and can only be defended on the possible hypothesis that the

[1] *Krishnendra Roy Chowdhry* v. *Maharani Shurnomoyee*, 21 Suth. W. R. 27.

[2] *Rajah Pertab Narain Singh* v. *Annoda Pershad Banerjee*, 2 Sev. 754.

piece of land which had become annexed to the adjoining estate had not, in the opinion of the Court (though declared by the Magistrate to be an accretion) attained such height as to cease to form part of the public domain.

Fishery in non-navigable rivers or streams.—Right of fishing in such rivers or streams prima facie vested in the owner of the subjacent soil.—Distinction between territorial and incorporeal fishery in non-navigable streams.—The right of fishing in a non-navigable river or stream primâ facie belongs exclusively to the person over whose land it flows, as an incident of the ownership of the soil.[1] He may either enjoy this right personally or part with it in favour of a stranger for a definite term or in perpetuity, reserving to himself the right to the soil. In the former case, it is a territorial fishery, belonging to the proprietor of the soil; in the latter, it exists in the grantee as an incorporeal right,[2] exerciseable over the soil of the grantor.

Modes of acquisition of incorporeal fishery.—This incorporeal right may be acquired either by grant from the owner of the soil or by prescription.

To whom does the right to the fishery in non-navigable streams flowing between two estates prima facie belong?—If a non-navigable river or stream runs through the common boundary of two estates, the presumption is that, the right of fishery does not belong to the proprietors of either estate exclusively.[3] Whether it belongs to them in common or in severalty usque medium filum aquae, does not appear to have been decided in this country.

Whether exclusive right of fishery in a non-navigable stream imports a right to the subjacent soil.—A right of fishery in non-navigable waters does not, in this country, per se import a right to the soil,[4] nor does it

1 Cf. *Forbes* v. *Mir Mahomed Hossein*, 12 B. L. R. 210 (P. C.); 20 Suth. W. R. 44.

2 *Ibid*; *Lutchee Dassee* v. *Khatima Bibee*, 2 Sel. R. 51; *Suroop Chunder Mozumdar* v. *Jardine Skinner &. Co.*, Marsh. 334; *Rajah Boroda Cant Roy* v. *Baboo Chunder Coomar Roy*, 12 Moo. Ind. App. (145) 155; 2 B. L. R. (P. C.) 1; 11 Suth. W. R. (P. C.) 1.

3 *Forbes* v. *Mir Mahomed Hossein*, 12 B. L R. 210 (P. C.); 20 Suth. W. R. 44.

4 *Ibid*; *David* v. *Grish Chunder Guha*, I. L. R. 9 Cal. 183; 11 Cal. L. R. 305; *Radhamohan Mundul* v. *Neel Madhab Mundul*, 24 Suth. W. R. 200; *Monohor Chowdhry* v. *Nursingh Chowdhry*, 11 Suth. W. R. 272 (in this case the soil was shown to be included within the ambit of the estate of the person against whom the holder of the fishery brought the suit); *Bissen Lal Dass* v. *Khyrunnessa Begum*, Marsh. 334; 2 Hay, 468; 1 Suth W. R. 78; *Lutchee Dassee* v. *Khatima Bibee*, 2 Sel. R. 51. *Contra*, a dictum of Garth, C. J., in *Rakhal Churn Mundul* v *Watson*, I. L. R. 10 Cal. 50.

entitle the holder of the fishery to the possession of the land when the waters dry up. But this right is sometimes conveyed in such terms as to confer on the grantee a right to the soil also. In such cases the question sometimes resolves itself into one of construction of the instrument by which the right was created, and possibly sometimes into one of fact, depending for its solution upon the mode of enjoyment of the subject-matter of the grant.

Modes of determining the right to the soil under different circumstances.—But if the question be, whether the bed of a non-navigable stream or of a lake or *beel* is parcel of the one or other of two conterminous estates, the exercise of rights of fishing in its waters, either directly or by letting them out to tenants, is clearly primâ facie evidence of ownership and possession of the soil.[1]

In a dispute between the proprietors of neighbouring estates with regard to the right to a julkur, or exclusive fishery in any piece of water, if the boundaries of the respective estates be known, the right to the fishery must be held to belong to him in whose estate the subjacent soil is situated.[2] But if the boundaries cannot be ascertained, the right must be determined by proof of possession or enjoyment.[3]

Right of the grantee of the entire julkur of a pergunnah.—A grantee of the entire julkur (fishery) rights of a pergunnah is entitled to fish in any natural watercourse or in any lake or pond not made by human agency,[4] situated within the pergunnah.

Obstruction to the passage of fish.—Neither the right of a riparian proprietor to erect dams or bunds in the bed of a natural stream for the purpose of irrigation or manufacture, nor that of an owner of a fishery to fix any contrivance in the soil for the purpose of catching fish, entitles him to obstruct the passage of fish in the stream to the detriment of other persons, who may possess similar rights of fishery in it; nor, in a stream, where the water dries up occasionally, is the owner of the bed entitled to construct in it reservoirs for fish, and surround them by lines of stakes or pallisades, so as injuriously to affect the rights of fishery of

[1] *Mohiny Mohan Das* v. *Krishna Kishore Dutt*, I. L. R. 9 Cal. 802; *Shama Sundaree Debia* v. *Collector of Maldah*, 12 Suth W. R. 164. As to lake, see *Rajah Boroda Kanta Roy* v. *Babu Chunder Coomar Roy*, 12 Moo. Ind. App. 145; 2 B. L. R. (P. C.) 1; 11 Suth. W. R. (P. C.) 1.

[2] *Joy Kishen Mookerjea*, petitioner, Cal. S. D. 1857, p. 511.

[3] *Woodoy Tara Chowdhrani* v. *Khaja Abdul Gunny*, 12 Suth. W. R. 164.

[4] *Koorona Moye Chowdhrani* v. *Joy Shunkur Chowdhry*, Suth. W. R., 1864, p 267.

other persons by restricting the area over which water may flow.[1] But it has been held by the Calcutta High Court that, if the dam or bund has existed for many years, such rights of fishery must be deemed to have become subject to the right of the riparian proprietor to keep up the dam or bund.[2] That decision was pronounced at a time when the law regarding the acquisition of rights in the nature of easements was neither provided by statute-law in this country, nor had received that degree of development which it has since attained. The right to maintain these structures, even when they are injurious to the rights of fishery possessed by other persons, is really a right of easement, and may be acquired either by enjoyment for such a length of time as would be sufficient to raise the presumption of a grant of the right from the other riparian proprietors, or by enjoyment for a period of 20 years under section 26 of the Indian Limitation Act, or section 15 of the Indian Easements Act, V of 1882.

Fishery in lakes and ponds.—Right of fishing in small lakes, ponds, &c. prima facie belongs to him in whose lands they are situated.—Primâ facie, the right of fishery in small lakes, ponds or pools unquestionably belongs to him exclusively in whose land they are situated.[3] If they lie on the common boundary between two estates, the right of fishing belongs to the proprietor of each estate in severalty ad medium filum aquae.[4]

Right of fishery in large non-tidal navigable lakes under English law.—The law, however, with regard to the right of fishing in large navigable non-tidal lakes does not appear to be so clearly settled in England, although the weight of opinion seems to be opposed to the right of the public. In *Marshall* v. *Ulleswater Steam Navigation Co.*[5], Justice Wightman, who delivered the judgment of the majority of the Court, observed that it was not necessary to determine in that case "whether the soil of lakes, like that of fresh-water rivers, primâ facie belongs to the owners of the land or of the manor on either side ad medium filum aquae, or whether it belongs primâ facie to the king in right of his prerogative (Com. Dig. Prerogative, D. 60; Hale, de Iure Maris, c. 1)." The question, however, directly arose in *Bloomfield* v. *Johnson*[6], with regard to the right of fishing in Lough Erne, a fresh-water lake in Ireland, forty-five miles in

1 *Sri Kant Bhuttacherjee* v. *Kedar Nath Mookerjee*, 6 Cal. L R. 243.

2 *Ram Das Surmah* v. *Sonatun Goohoo*, Suth. W. R., 1864. p. 275.

3 Paterson's Fishery Laws, 2; Coulson & Forbes' Law of Waters, 369.

4 Woolrych on Waters (2nd ed.), 121.

5 3 B. & S. 732.

6 Ir. R. 8 C. L. 68. See, however, *Reg* v. *Burrow*, 34 Justice of Peace, 53.

length and navigable throughout its whole length. The Irish Exchequer Chamber, if not without some degree of hesitation, held, affirming the judgment of the Court of Common Pleas, that the right of fishery in large navigable and non-tidal lakes is not common to the public.

The point again came on for consideration in *Bristowe* v. *Cormican*[1], on demurrer, with regard to Lough Neagh, a fresh-water lake in Ireland. The Irish Court of Exchequer held themselves bound by the above decision. No appeal was, however, preferred from that judgment, but on appeal to the Irish Exchequer Chamber from an order of the Court making absolute a conditional order for new trial, on the ground of misdirection on other grounds, Whiteside, C. J., took occasion to express his firm dissent from the principle laid down in *Bloomfield* v. *Johnson*.[2]

The case went up on appeal before the House of Lords,[3] but as the question of the public right of fishing in the lake was not before the House, no decision on that point was given. The noble and learned Lords, however, who advised the House of Lords on that occasion, were almost unanimously of opinion that the soil of the lake or its fishings, did not belong to the Crown under its prerogative. Earl Cairns, L. C., said : "The Crown has no de iure right to the soil or fisheries of a lough like Lough Neagh. Lough Neagh is, as your Lordships are aware, the longest inland lake in the United Kingdom and one of the largest in Europe. It is from fourteen to sixteen miles long, and from six to eight miles broad. It contains nearly 100,000 acres; but though it is so large, I am not aware of any rule which would, primâ facie, connect the soil or fishing with the Crown, or disconnect them from the private ownership, either of the riparian proprietors or of other persons." Lord Hatherley observed :—"Clearly no one has a right to say that it became vested in the Crown because it belonged to nobody else. This is an inland lake, and therefore it is not a portion of land belonging to the Crown by reason of its being on the shore of the sea, or a navigable strait or river." Lord Blackburn was clearly of opinion that the Crown had no right to the soil or fishery of such lakes, but he was doubtful whether the rule, that the adjoining proprietors are entitled to the soil usque medium filum aquae (and consequently to the right of fishery therein) applied to such lakes as Lough Neagh. His Lordship said—"The property in the soil of the sea and of estuaries and of rivers in which the tide ebbs and flows is primâ facie of common right vested in the Crown; but the property of dry land is not of

[1] Ir. R. 10 C. L. 434. [2] Ir. R. 8 C. L. 68. [3] 3 App. Cas. 641.

common right in the Crown. It is clearly and uniformly laid down, in our books, that where the soil is covered by the water forming a river in which the tide does not flow, the soil does of common right belong to the owner of the adjoining land; and there is no case or book of authority to shew that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake." After referring to the observations of Justice Wightman in *Marshall* v. *Ulleswater Steam Navigation Co.*,[1] which I have quoted before,[2] his Lordship continued;—"This is the only case cited, and as far as I can find, the only case which exists, where there is even a suggestion that the Crown, of common right, is entitled to the soil of lakes. Neither the passage in *Comyns*, nor that in *Hale*, de Iure Maris, cited by Mr. Justice Wightman, gives any countenance to such a doctrine. But it does appear that that learned Judge did not think that the law as to land covered by still water was so clearly settled to be the same as the law as to land covered by running water, as to justify in unnecessarily deciding that it was the same. More than this I think does not appear from this case. I own myself to be unable to see any reason why the law should not be the same, at least when the lake is so small, or the adjoining manor so large, that the whole lake is included in one property. Whether the rule that each adjoining proprietor, where there are several, is entitled, usque ad filum aquae should apply to a lake is a different question. It does not seem very convenient that each proprietor of a few acres fronting in Lough Neagh should have a piece of the soil of the lough many miles in length tacked on to his frontage."[3] "It is, however,

[1] 3 B. & S., 732. [2] *Supra*, 378.

[3] This argument was repeated by the same noble and learned Lord in *Mackenzie* v. *Bankes*, 3 App. Cas. (1324) 1340. His Lordship said:—"Those who are proprietors upon the shore of a lake may boat upon it and may catch fish or shoot wild fowl upon it. If you were to apply the same rule as would be applied in a river, a man who had a few yards of land upon the edge of a lake, should have attached to it a right to have what I may call a long projecting promontory of water, perhaps miles long, tacked on to his land, and he would of course have a right to say, I myself will sail up and down this long narrow strip of land covered with water. I will fish and I will shoot there. I will take care not to go over the boundary on either side, and nobody shall come into my long narrow strip. This would be very inconvenient in practice." It was enunciated in this case that according to the law of Scotland, if there be more than one proprietor on the shores of a lake, the right of fishing, fowling and boating in or upon its waters presumably (in the absence of exclusive possession for a sufficient period, or of anything in a title to show the contrary) belongs to all such proprietors in common, subject (if need be) to judicial regulation.

necessary to decide whether the Crown has of common right a primâ facie title to the soil of a lake; I think it has not. I know of no authority for saying it has, and I see no reason why it should have it."

Lord Gordon declined to express any opinion upon this point.

Under American law.—On the other hand, in New York and several other states in America, the right to the soil and fishery of large navigable fresh-water lakes has been held to belong to the public. In the case of *Canal Commissioners* v. *People*,[1] the Court of Errors in New York held that the common rule that the soil and fishery of navigable rivers above the tide primâ facie belong to the riparian proprietors, did not apply to the large navigable fresh-water lakes in that country. Chancellor Walworth, in delivering the judgment of the Court, said :—"The principle itself does not appear to be sufficiently broad to embrace our large fresh-water lakes or inland seas, which are wholly unprovided for by the Common law of England. As to these, there is neither flow of the tide nor thread of the stream, and our own local law appears to have assigned the shores down to the ordinary low-water mark to the riparian owners, and the beds of the lakes with the island therein to the public."

Right of fishery in ponds, lakes, &c. generally, according to Anglo-Indian law.—In this country, if ponds, pools or lakes (whether large or small, navigable or non-navigable is quite immaterial) are situated in the land of a single proprietor, the right of fishing in their waters primâ facie belongs to him alone. If they are situated in the lands of more proprietors than one, the right of fishing belongs to them all. Government has apparently never advanced on behalf of the public any claim to the right of fishery in large lakes, but has always conceded the same to the riparian proprietors. Whether in the absence of proof of any particular mode of enjoyment exercised for a sufficient period, such right belongs to all the riparian proprietors in common or in severalty, does not appear to have ever been decided.

It is perhaps unnecessary to repeat again what has been already stated before, that a current of decisions of the Calcutta Sudder Dewanny Adawlut and the High Court has established a distinction with regard to

[1] (1830) 5 Wend. (Amer.) (423) 446 The same rule has been adopted in New York and Vermont with regard to lake Champlain, in New Hampshire as to lake Winnipiseogee (which is about 25 miles long), and in Michigan as to lake Muskegon (which is 6 miles long and with an average width of 2½ miles). Gould on Waters, §§ 82, 82a, and the cases cited therein Angell on Watercourses (7th ed.), § 42.

the right of fishery in lakes, where such lakes are connected with a flowing river by an inlet. In such case, the right of fishing in the lake has been held to belong to the owner of the fishery in the river.[1]

The rule that, the ownership of a right of fishery in a river does not raise any presumption as to the ownership of the subjacent soil, applies equally to rights of fishery in lakes[2] or tanks.[3]

Sums annually payable under a lease of a fishery, whether rent or not.—The sum usually reserved in leases of rights of fishing as being annually or periodically payable for their enjoyment, does not properly come within the denomination of rent, and therefore the framers of the Bengal Tenancy Act (VIII of 1885), were constrained to provide in express terms, as they have done by section 193, that the provisions of that Act, applicable to suits for the recovery of arrears of rent, should, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of any rights over fisheries.

Right of occupancy in respect of the julkur of a stream, &c.—Right of occupancy cannot be acquired in the julkur or fishery of a stream, lake[4] or a tank.[5] But if the right has been acquired in respect of land let for agricultural purposes, and there is a tank upon it, there would be a right of occupancy in the tank as appurtenant to the land, or, perhaps more properly speaking, the tenant would have the exclusive right of fishing in such waters so long as his right to the land subsisted.[6]

B. Topics relating to rights of fishery in general.—Before concluding my observations with regard to rights of fishery in the several kinds of waters which I have already enumerated, I propose to deal with a few topics which relate to fisheries in general.

Whether a right to compensation exists for loss of right of fishery, when the subjacent soil is acquired for public purposes.—It has been decided in America that a riparian proprietor upon a non-navigable stream is entitled to compensation only for land acquired by a town for public purposes, and not for the value of his right of fishery in the stream, even

1 *Supra*, 374.

2 *Suroop Chunder Mozumdar* v. *Jardine, Skinner and Co.*, Marsh 334; 2 Hay, 168.

3 *Ertozah Hossein* v. *Huro Pershad Singh*, 5 Suth. W. R. 281.

4 *Juggobundhoo Shahi* v. *Pramatha Nath Roy*, I. L R. 4 Cal. 767; *Uma Kanta Sirkar* v. *Gopal Singh*, 2 Suth. W. R. (Act X), 19.

5 *Gopal Chandra Chowdhry* v. *Shibu Jelya*, 19 Suth. W. R. 200.

6 *Nidhy Krishna Bose* v. *Ram Dass Sen*, 20 Suth W R 341; *Shim Narain Chowdhry* v. *The Court of Wards*, 23 Suth W R 432.

though the statute, which conferred such authority, provided for the payment of all damages 'sustained in any way by any persons in their property, in carrying into effect this Act.'[1]

An exclusive license to fish in all waters situated within an estate given by a memorandum not under seal, does not create any interest in land, so as to entitle the licensee to claim compensation under the Lands Clauses Consolidation Act, for the injury to his right of fishing caused by the construction of a line of railway through the estate. According to the opinion of Mr. Justice Willes, even a grant under seal gives him no better title.[2]

Whether the English Prescription Act applies to rights of fishery in gross.—In *Shuttleworth* v. *Le Fleming*[3] the Court of Common Pleas in England, upon the construction of the language of the Prescription Act (2 and 3 Will. IV. c. 71), came to the conclusion that the statute did not apply to a right of fishery in gross. In its judgment, the Court laid stress upon the argument that great difficulties would arise as to the evidence necessary to establish the nature and quantity of rights in gross, if they were assumed to be within the statute; such as, for instance, whether sixty or thirty years' enjoyment by one man in the course of his own life, and no more, would establish any right, either in that man for life or a descendible right in gross, although there might be nothing in the nature of his single enjoyment to indicate perpetuity; while no such difficulties, did arise in the case of rights proved and determined by user and enjoyment by the occupier of a dominant tenement.

It would seem therefore that, according to English law, a right of fishery in gross may be acquired either by express grant, by prescription at Common law, or under the doctrine of modern lost grant.

Provisions of the Indian Limitation Act and the Easements Act respectively, regarding rights of fishery in gross.—Before the passing of the Indian Limitation Act (XV of 1877), a julkur, including a right of fishery in gross, was deemed to be an interest in immoveable property, and consequently capable of being acquired by exclusive enjoyment for a period of twelve years.[4]

[1] *Cole* v. *Eastham*, 133 Mass. (Amer.) 65, cited in Gould on Waters, Apdx.

[2] *Bird* v. *The Great Eastern Railway Co.*, 19 C. B. N. S. 268; 34 L. J. C. P. 366; 11 Jur. N. S. 782.

[3] 19 C. B. N. S. 687; 34 L. J. C. P. 309.

[4] *Parbutty Nath Roy Chowdhry* v. *Madhu Paroe*, 1. L. R. 3 Cal. 276; 1 Cal. L. R. 592; *Lucky Monee Dassee* v. *Karuna Kanto Moitra*, 3 Cal. L. R. 509; *Maharani Shurnomoyi* v. *Degumbari Debya*, 2 Shome's. R. 93.

But that view has been abrogated by the Act, which has given to the word 'easement', by the definition contained in section 3, a more extended signification, including in the term a right to 'remove and appropriate anything *growing* or *subsisting* upon the land of another,'—which is clearly wide enough to embrace a right of fishery,—and has provided by section 26 a period of twenty years for the acquisition of such a right.[1] It has been decided by the Calcutta High Court that section 26 taken in conjunction with section 3 applies also to rights of fishery in gross;[2] but a comparison of the language of this section with that of an almost, if not quite, similar provision of the English Prescription Act, renders it perhaps questionable whether the same construction ought not to be adopted as was done in *Shuttleworth* v. *Le Fleming*.[3]

The above special interpretation, which has been assigned to the term easement by Act XV of 1877, has been repealed by the Indian Easements Act, V of 1882[4], in the territories to which that Act applies, and that Act relates to easements proper, and profits à prendre which are appurtenant.[5] Therefore, in these territories there is at present no statutory provision defining the period during which enjoyment may be necessary for the acquisition of a right of fishery *in gross* (the leading type of rights of fishery in India), unless it be regarded as an interest in immoveable property, and therefore capable of being acquired by adverse enjoyment for twelve years.

A fluctuating body of inhabitants of a vill, parish or a borough, cannot by custom claim a right to a fishery.—A uniform course of decisions[6]

1 *Chandi Charan Roy* v. *Shib Chunder Mandal*, I. L. R. 5 Cal. 945; 6 Cal. L. R. 269; *Luchmiput Singh* v. *Sadaulla Noshyo*, I. L. R. 9 Cal 698.

2 *Chandi Charan Roy* v. *Shib Chunder Mandal*, I. L. R. 5 Cal. 945; 6 Cal. L. R. 269.

3 19 C B. N. S. 687; 34 L. J. C P. 309.

4 See s. 3.

5 See s. 4. Expl. of the words 'to do something,' and illust. (*d*).

6 *Gateward's case*, 6 Rep. 59*b*; Cro. Jac. 152; *Foxall* v. *Venables*, Cro. Eliz. 180; *Agnes Fowler* v. *Dale*, Cro. Eliz. 362; *Mellor* v. *Spateman*, 1 Wms. Saund. 340*c*, n. 3; *Rex* v. *Churchill*, 4 B. & C. 755; *Weekly* v. *Wildman*, Ld. Raym. 405; *Day* v. *Savadge*, Hob. 86; *Selby* v. *Robinson*, 2 T. R. 758; *Grimstead* v. *Marlow*, 4 T. R. 717; *Ozenden* v. *Palmer*, 2 B. & Ad. 236; *Blewett* v *Tregonning*, 3 A. & E. 554; *Sowerby* v. *Coleman*, L. R. 2 Ex. 96; *Attorney-General* v. *Mathias*, 4 K. & J. 579; 27 L. J. Ch 761; *Constable* v. *Nicholson*, 14 C. B. N. S. 230; 32 L. J. C. P. 240; *Knight* v. *King*, 20 L. T. N. S. 491; *Clayton* v. *Corby*, 5 Q. B. 419; *Baird* v. *Fortune*, 7 Jur. N. S. 926; *Chilton* v. *Corporation of London*, 7 Ch. D. 735; *Lord Rivers* v. *Adams*, 3 Ex. D. 361; *De La Warr* v. *Miles*, 17 Ch. D. 585; *Goodman* v. *Mayor of Saltash*, 7 App. Cas. 633; But a custom for the inhabitants of a parish or vill to draw water from a spring situated in

has, in England, since *Gateward's case*[1] (though the existence of earlier authorities[2] to the same effect, if not of equal weight, may be traced as far back as the reign of Edward IV), has conclusively established the doctrine that, with certain exceptions[3] recognized by law, a fluctuating body of individuals, such as the inhabitants of a parish, vill, or a borough, or even a particular class of such inhabitants (without prescribing in a que estate) cannot, merely by reason of their inhabitancy, claim by custom a right to a profit â prendre in the soil of another, such custom being unreasonable, uncertain and opposed to the policy of the law.

A right of fishery, properly so called, being in its essence, a right to a profit â prendre in alieno solo,[4] claims by such inhabitants or by the public generally, or any portion of it, by virtue of a custom or immemorial usage, to catch and appropriate fish from private waters, such as a lake, pond or even a navigable river above the flow of the tide,[5] or from a several and exclusive fishery in a tidal navigable river held by a grantee under the Crown,[6] have in several modern cases, been held to fall within the scope of this principle, and therefore to be void in law.

private soil, is good in law; such right being in the nature of an easement simply, and not being a right to interfere with or carry away the soil, which a profit â prendre is. *Race* v. *Ward*, 4 E. & B. 702; 24 L. J. Q. B. 153; *Smith* v. *Archibald*, 5 App. Cas. 489; *Manning* v. *Wasdale*, 5 A. & E. 758.

[1] 6 Rep. 59*b*; Cro. Jac. 152. This case was decided in the fourth year of the reign of James I.

[2] *Boteler* v. *Bristow*, Year Book, 15 Ed. IV, 29*b*, 32*b*; *Costard & Wingfield's case*, Godbolt, 96; 3 Leonard, 202.

[3] These exceptions are in favour of copyholders and customary freeholders: see *Gateward's case*, 6 Rep. 59*b*; (tinbounders and perhaps mariners too), Hall on Profits à Prendre, &c., 213-241

[4] *Wickham* v. *Hawker*, 7 M. & W. 63

[5] *Lloyd* v. *Jones*, 6 C. B. 81; 17 L. J. C. P. 206; *Bland* v. *Lipscombe*, 4 E. & B. 713, note; 24 L. J. Q. B. 155; *Hudson* v. *M'Rae*, 4 B. & S. 585; 33 L. J. M. C. 65; *R.* v. *Stimpson*, 4 B. & S. 301; 32 L. J. M. C. 208; *Hargreaves* v. *Diddams*, L. R. 10 Q. B. 585; *Murphy* v. *Ryan*, Ir. R. 2 C. L. 143; *Goodman* v. *Mayor of Saltash*, 7 App. Cas. (633) 651-662 *per* Lord Blackburn.

The view suggested by Serjeant Woolrych in his treatise on the Law of Waters, (2nd ed. p. 129), that such immemorial user by the public should be supported on the ground of dedication or abandonment (such as when a prescriptive right in a public river is neglected), was put forward in the argument of counsel in *Neill* v. *Duke of Devonshire*, but Lord Selborne rejected it as unsound. 8 App. Cas. (135), 154.

[6] *Neill* v. *Duke of Devonshire*, 8 App. Cas. (135) 154, *per* Lord Selborne.

First reason for the rule.—The principal, and probably the strongest, reason assigned for the existence of this doctrine is that contained in the fourth resolution in *Gateward's case*,[1] substantially to the effect that it is repugnant to the nature of an inheritance in a profit à prendre in real property, that it should be vested in a body permanently incapable of releasing or dealing with it; or, in other words, that the recognition of such interests in real property as the custom in question involves, would be obnoxious to the law or rule against perpetuity.[2] It is obvious, therefore, that this reason cannot apply where the claim to a profit à prendre is made by a class of persons through a corporation under its corporate title[3], or under a grant direct from the Crown and out of the Crown's soil (because in such a case the prerogative of creating corporations being possessed by the Crown, incorporation of the grantees, quoad the grant, is presumed, if necsssary, for the purpose of giving effect to it[4]), or under an Act of Parliament[5], or when such right is claimed in a que estate, that is to say, as being annexed to land.[6]

Second reason.—Another reason by which this rule is generally supported, though it is not to be found among the several resolutions in *Gateward's case*,[7] is, that an unlimited right in a body capable of indefinite increase would lead to the destruction of the subject-matter of the custom, and to the total exclusion of the owner of the soil, or (in the case of a several and exclusive fishery in a tidal navigable river) of the owner of the franchise from any participation in its produce.[8]

Comments on the second reason.—But this last argument, however

1 6 Rep 59b; Cro. Jac. 152.

2 *Per* Lord Blackburn in *Goodman* v. *Mayor of Saltash*, 7 App. Cas. (633) 655. With regard to *Gateward's case*, Lord Fitzgerald thus remarked in his speech in the above case: "As to *Gateward's case* I may say that I am no admirer of it, nor do I entirely appreciate its reasoning, or the wisdom of its conclusions. Probably, if the same questions had arisen in the present time, unfettered by authority, it might be found very difficult to reach the same results" on p. 669.

3 *Boteler* v. *Bristow*, Year Book, 15 Ed. IV. 29b, 32b; *White* v. *Coleman*, Freem. 135; 3 Keb. 247; *Lord Rivers* v. *Adams*, 3 Ex. D. 361; *Goodman* v. *Mayor of Saltash*, 7 App. Cas. 633.

4 *Willingate* v. *Maitland*, L. R. 3 Eq. 103; 36 L. J. Ch. 64; *Chilton* v. *Corporation of London*, 7 Ch. D. 735; *Lord Rivers* v. *Adams*, 3 Ex. D. 361.

5 *Chilton* v. *Corporation of London*, 7 Ch. D. 735.

6 *Constable* v. *Nicholson*, 14 C. B. N. S. 230; 32 L. J. C. P. 240.

7 Rep. 59b; Cro. Jac. 152.

8 *Lord Rivers* v. *Adams*, 3 Ex. D. 361; *Bland* v. *Lipscombe*, 4 E. & B. 713, note; 24 L. J. Q. B. 155, note; *Race* v. *Ward*, 4 E. & B. 702, *per* Lord Campbell, C. J., arguendo; *Sowerby* v. *Coleman*, L. R. 2 Ex. 96; 36 L. J. Ex. 57.

valuable it may be in the abstract, considered in the light of the actual state of things does not seem to carry with it very great weight. The fact that these rights in profits à prendre are by their very nature periodically recurrent, forbids the supposition that their exercise can practically be ever so unlimited or unreasonably large as necessarily to cause the exhaustion or destruction of the subject of the rights, and with it the consequent annihilation of the rights themselves, unless we impute to the holders of these rights an utter and wanton disregard of their self-interest. Hence we find that in most of the cases which have arisen, the rights in question were never claimed to belong to more than a particular class of persons or a section of the community, and its exercise never asserted for more than a particular portion of the year, more or less limited. If that be so, it is difficult to see how the owner of the soil, or the owner of the franchise, is ever in fact excluded from participation in the profits. Moreover, the circumstance that continuance of immemorial user, which is of the essence of these so-called customs, is consistent only with the supposition that there has been actual acquiescence on the part of the owner of the soil or of the franchise, for a period co-extensive with the duration of such immemorial user, is also a fair answer to the à priori possibility of exhaustion or destruction of the subject-matter of the right as the inevitable consequence of unlimited exercise.

Another objection as to the soundness of the second reason seems to be, that it apparently militates against the first. For, if the second reason taken alone be sufficient (as presumably it is considered to be by those who rely upon it) to invalidate a claim to a profit à prendre, whenever it involves the possibility, in the event of indefinite multiplication of the number of claimants, of the destruction of the subject-matter of the claim, it ought to be so, whether the claim is made through a corporation or not; but, as I have said already, a corporation may legally claim a right to a profit à prendre in alieno solo, notwithstanding the fact that the exercise of the right may possibly lead to the destruction of the subject of the right.

Goodman v. Mayor of Saltash.—Neither of these two reasons, however, was held sufficient to invalidate the claim set up in the somewhat recent case of *Goodman* v. *Mayor of Saltash*[1] decided by the House of Lords. There a prescriptive right to a several oyster fishery, (*i. e.*, an exclusive fishery presumed by reason of long enjoyment to have been

[1] 7 App. Cas. 633.

originally derived from the Crown) in a tidal navigable river was proved to have been exercised from time immemorial by a borough corporation and its lessees, without any qualification, except that the free inhabitants of ancient tenements in the borough had from time immemorial, without interruption and claiming as of right, exercised the privilege of dredging for oysters in the locality in question from Candlemas to Easter-eve in each year, and of catching and carrying away the same without stint for sale and otherwise. The House of Lords (Lord Blackburn dissenting) held that the claim of the inhabitants was not to a profit à prendre in alieno solo; that a lawful origin for the usage ought to be presumed, if reasonably possible, and that the presumption which ought to be made, as reasonable in law and probable in fact, was that the original grant to the corporation was subject to a trust or condition in favour of the free inhabitants of ancient tenements in the borough that they should be entitled to fish, as they had been accustomed to do, in every year from Candlemas to Easter.

"In such a grant" observed Lord Selborne, L. C., in answer to the objection based upon the first of the above two reasons, "there would be all the elements necessary to constitute what, in modern jurisprudence, is called a charitable trust. 'If I give' (said Lord Cairns, in the *Wax Chandler's case*[1]), 'an estate to A. upon condition that he shall apply the rents for the benefit of B., that is a gift in trust to all intents and purposes.' A gift subject to a condition or trust, for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust: and no charitable trust can be void on the ground of perpetuity."

Adverting to the finding in paragraph 16 of the special case to the effect that the usage in question tended to the destruction of the fishery, and if continued would destroy it (which, in fact, is the objection founded upon the second reason) his Lordship said:—"The tendency to the destruction of the oyster fishery, spoken of in the special case, can mean no more than what must always be in the power of the public, where there is a general public right of fishing, or of any owner (whether absolute or limited), where there is a several fishery, namely, the exhaustion of the fishery, by taking excessive numbers of fish. Fish (whether floating or shell-fish) are not part of the soil or freehold. Their capture is merely the ordinary mode of the perception of those fruits and profits which a fishery produces. They grow, and are reproduced continually from spat

[1] L. R. 6 H. L. 21.

and spawn; and if it is true that a fishery might possibly be exhausted, by excessive fishing, it is only in the same way that a field may be exhausted by over-cropping. If the corporation had taken the fishery upon condition or trust that the free inhabitants of ancient messuages should be at liberty to fish without stint, for sale or otherwise, at all seasonable times throughout the year, the possibility of the exhaustion of the oyster beds by an improvident use of that privilege would not have been a valid objection to such a condition or trust; and, if not, it cannot be so, when the right is more limited. The usage, in this case, although it is to take oysters 'without stint for the purpose of sale or otherwise,' is not unlimited; being confined to a particular class of persons, *viz.*, the inhabitants of ancient messuages within the borough (whose number would not be capable of indefinite increase), and to a particular time of the year, varying between a minimum of seven and maximum of twelve weeks. It must also necessarily be subject to any general restriction, by statute law, as to taking the spat, spawn, and young brood of oysters, and to any reasonable regulations, consistent with the substance of the right itself, which the corporation may think fit to make, by law, or otherwise as to the manner of exercising it."

Even Lord Blackburn, who disagreed with the rest of the noble and learned Lords in the view taken by them with regard to the validity or otherwise of the objection founded upon the first reason, and was consequently obliged to dissent from the ultimate conclusion arrived at by them, answered the above objection in more unqualified terms than those in which Lord Selborne had done. His Lordship said:—"I do not attach any weight to the statement in paragraph 16. I do not doubt its truth, but the unlimited right given at Common law, in the absence of prescription, to all the public to fish would be even more likely to destroy the oysters. It affords an excellent reason why the mayor and aldermen, if they have the power—as, till I learned that the decision of the House was to be the other way, I thought they had—should put an end to the practice, or put it under such restrictions, as will prevent the oysters from being extirpated; just as it affords a reason why the legislature should put restrictions on the Common law right; but does not prevent the mode of enjoyment from being legal, though wasteful."

It having been laid down by the Court of Exchequer Division in *Lord Rivers* v. *Adams*[1] that, a claim by the inhabitants of a parish to cut and

[1] 3 Ex. D 361.

carry away for use as fuel in their own houses fagots or baskets of the underwood, growing upon a common belonging to the lord of the manor, was a claim to a profit à prendre in alieno solo, and was therefore void according to law, it was argued on the strength of that case that the claims of the inhabitants in the case before the House of Lords was also to a profit à prendre, and that a trust or condition should not be presumed to support such a claim; because, if such a presumption could legally be made in the one case, there was no apparent reason why it was not made in the other. But Lord Selborne, L. C., distinguished that case upon the ground that, if the defendants there had alleged the plaintiff to be their trustee, that allegation would have been met by the production of the plaintiff's title-deeds shewing that he held under conveyances made to him and his ancestors without any trust. This, however, could not be done in the case before the House, because here the defendant, corporation, the mayor and free burgesses of Saltash made their title to the several fishery by prescription, and not by express grant.

Lutchmiput Singh v. Sadaulla Nashayo.—It is somewhat strange to observe that, besides the case of *Luchmiput Singh* v. *Sadaulla Nashyo*,[1] there is not to be found in the books one other instance in which the point we have just discussed has ever arisen for consideration in any of the Courts in this country. The plaintiff in that case, the patnidar of a certain pergunah, brought a suit against some of the inhabitants of particular villages comprised in it, for a declaration that they had no right to fish in certain *beels* or lakes situated within the pergunah, as well as for an injunction to restrain them from catching and carrying away fish therefrom. The defendants (inter alia) alleged that, they in common with the other tenants of that pergunah, as well as with the tenants of some other neighbouring pergunahs, had from time immemorial and by virtue of an ancient custom exercised the right of fishing in those *beels*. The Court following the rule laid down in *Lord Rivers* v. *Adams*,[2] (which case according to its opinion, being founded upon sound reason, and dictated by natural justice, was universally applicable), held that there being no proof of incorporation of the inhabitants at any period of time, there was no sufficient ground for the presumption of a grant from the sovereign power. And, secondly, that, the custom set up was unreasonable and consequently void, because the inhabitants on whose behalf the

[1] I. L. R. 9 Cal. 698.

[2] 3 Ex D. 361.

right was claimed, might increase so indefinitely as practically to exclude the owner of the property from participation in its profits.

It is perhaps scarcely necessary to state, having regard to what has been already said, that the last ground for the judgment of the Court is unsustainable, and the decision must therefore here, as in England, rest upon the only other ground, namely, that it infringes upon the rule against perpetuity.

C. **Remedies for disturbance of rights of fishery.**—The disturbance of rights of fishery may be redressed or prevented either by civil actions or by criminal proceedings.

I. **Civil actions.**—According to English law, ejectment, trespass, trover and action upon the case, appear to be the principal civil remedies at law; and a bill of peace, or sometimes an injunction, to be the only remedies in equity for the invasion of rights of fishery.[1] Without entering minutely into the learning concerning these several forms of remedies, it may perhaps be sufficient to state generally that (notwithstanding some expressions of opinion in an earlier authority[2] to the contrary), action of ejectment is altogether inappropriate to any other kind of fishery except that which is united with the ownership of the soil, or territorial fishery, as it is called; that trespass is the proper remedy for immediate injuries either to a several[3] or to a territorial fishery, there being a presumption in the case of a several fishery that it is attached to the ownership of the soil; that trover is nearly allied to trespass, and may be adopted where a several fishery, or a right of free fishery or a common of fishery is invaded; and that an action on the case lies for consequential injuries resulting from the disturbance of any of these different kinds of fishery.

But in equity a bill of peace or an injunction is equally available, whatever may be the nature of the fishery sought to be protected.

A bill of peace (Quia timet) is sometimes filed in equity for the purpose of quieting persons in the established possession of their fisheries, although there may be no actual disturbance or interruption; and an injunction is sued for to restrain persons from an improper invasion of such rights.

[1] Woolrych on Waters (2nd ed.), 237-242.

[2] *Rex* v. *Old Alresford*, 1 T. R. (353) 361.

[3] *Holford* v. *Bailey*, 13 Q. B. 426; 18 L. J. Q. B. 109. See authorities collected in the report of the judgment of the lower court in the same case, 8 Q. B. 1000; see pp. 1007, 1010.

These technical distinctions in the nature of actions are not recognized by the law of this country, according to which an action for recovery of possession of a fishery, for a declaration of right thereto, for an injunction, or for damages, for catching and carrying away fish seem to be the principal remedies for the vindication or protection of rights of fishery. According to the opinion of the High Court of Bombay a summary action under section 9 of the Specific Relief Act (I of 1877) for restitution of possession of an exclusive fishery, whether such fishery be territorial or a right in alieno solo, may also be entertained, provided the conditions specified in that section be satisfied.[1] But the Calcutta High Court has held that this form of action does not apply to rights of fishery of the latter kind.[2] This variance is due to a difference of opinion between the two High Courts, as to the denotation of the term 'immoveable property' used in that section, which makes this form of action applicable to such property alone.

II. **Criminal Proceedings.**—Apart from the special statutory regulations relating to fisheries existing in any system of law, it may be broadly stated that violation of rights of fishery does not in general entail any criminal responsibility. The proposition, however, is subject to certain well-defined exceptions deduced from the doctrine of legal possession, which, in truth, underlies the rules of law regarding ferae naturae. An examination of the law regarding ferae naturae will disclose at once the true limits of the general rule and the nature of the exceptions.

Roman law regarding ferae naturae.—According to the Roman law wild beasts, birds and fishes were regarded as res nullius or as belonging to no one before capture. Actual capture conferred both possession and dominion on their captor, whether he caught such wild beasts or birds on his own land or on that of another.[3]

1 *Bhundal Panda* v. *Pandol Pos Patil*, I. L. R. 12 Bomb. 221.

2 *Notobur Parue* v. *Kubir Parue*, I. L. R. 18 Cal. 80. See *Haro Dyal Bose* v. *Kristo Gobind Sen*, 17 Suth. W. R. 70 (as to a right of way not falling within the provisions of the repealed Act, XIV of 1859, s. 15).

3 Omnia igitur animalia, quae terra mari caelo capiuntur, id est ferae bestiae et volucres pisces, capientium fiunt. Dig. xli. 1. 1. 1 (Gaius).

Quod enim nullius est, id ratione naturali occupanti conceditur. Dig. xli 1. 3, pr., (Gaius).

Nec interest quod ad feras bestias et volucres, utrum in suo fundo quisque capiat an in alieno. Dig. xli. 1. 3. 1, (Gaius).

Vide etiam, Inst. ii. 1. 12.

It may, at the first blush, seem somewhat anomalous that animals ferae naturae should, by mere capture, become the property of their captor, and not of the person on whose land they are caught, even though the former may have entered on the land of his neighbour against his will, and caught or killed the game there; but this indeed is merely the necessary result of the doctrine relating to occupatio, recognized by the Roman lawyers as an original mode of acquisition of property in things of which there was no previous owner or possessor.[1]

A landowner under that law, doubtless, had a right to forbid a stranger from coming on his land,[2] but, if in spite of the prohibition, the latter succeeded in effecting his entry, there was nothing in law to prevent him when once there from fishing, fowling or hunting[3], and appropriating the things caught or killed as his own;[4] the effect of the prohibition, if he received express notice of it, being merely to expose him to an actio injuriarum.[5]

Vinnius, in his commentary upon the passage in the Institutes which lays down the above rules, thus explains the reason upon which it is founded. He observes:—"The fact that the law prescribes that, no one is entitled to hunt on the land of another against his will, makes no difference, because prohibition cannot either change or efface the condition of animals so as to make them the property of the prohibiter; if it had been otherwise, he would have been entitled not merely to an actio injuriarum, but also to a rei vindicatio and a condictio furtiva," (that is to say, he would have been entitled to recover the specific animal caught, and also to prosecute the captor for theft).[6]

Commenting on this passage in the Institutes, Vinnius, says:—

Igitur ferae bestiae, quadrupedes, volucres, pisces, simul atque ab aliquo captae, hoc est, apprehensae et in manum ac potestatem alicuius redactae sunt, iure gentium statim illius esse incipiunt. Comm. ad Inst. lib. ii. t. 1. text. De occupatione ferarum.

[1] Originarie adquiri res, quae in nullius sint dominio, et quidem simpliciter substantiam rei adquiri per occupationem. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De rebus singulorum.

[2] Dig. xli. 1 3. 1; Inst. ii. 1. 12; Dig. xlvii. 10. 13. 7. The landowner could expel a stranger even by force. Dig. xliii. 16. 3. 9.

[3] "Cuius"—id est venationis—"species sunt venatio, quadrupedum, aucupium, piscatio." Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De occupatione ferarum.

[4] Quid si nihilominus ingressus sit, et feram ceperit? Vulgo placet, adhuc eam occupantis fieri, et recte. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De occupatione ferarum.

[5] Dig. xlvii. 10. 13.7. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De occupatione ferarum.

[6] Non obstat, quod in praedio alieno domino invito venari non licet, l. 16. *de serv. rust.*

The general immunity from criminal liability in the case of capture of animals ferae naturae on the soil of another being, as we have seen, the result of absence of possession or ownership of them by any person, it necessarily follows, as a clear exception to the rule, that such liability must needs exist in those cases where from the nature of the situation of the ferae naturae towards the owner of the soil on which they are found, it is possible to predicate legal, if not physical, possession or ownership (legal possession and ownership being in the case of ferae naturae connascent and concurrent,) of them in such owner.

"Likewise wild beasts" says Nerva, the younger, "which we have shut up in parks, and fishes which we have put into ponds, are possessed by us. But those fishes which are in a lake, or those wild beasts which roam in enclosed woods, are not possessed by us, since they are left in their natural liberty: otherwise a purchaser of the wood would be considered to possess all the wild animals, which is not the case."[1]

A park (vivaria) though perhaps relatively smaller than what is denoted by the term 'enclosed wood' (silva circumsepta) is equally an enclosed space of ground, and yet in the one case we are said to be in possession of the wild animals confined within it, but not in the other. The explanation of this apparent anomaly must be sought in the fact that, according to the Roman jurists, the mere enclosing of wild animals within a certain area, more or less large, was not sufficient to reduce or retain them into the legal possession of the owner of the soil. "A silva circumsepta" as observed by Savigny "may be very large, and one may hunt in it in vain for any particular animal enclosed therein; therefore, we have no possession of such animal, although in point of fact it is con-

praed. nam prohibitio ista conditionem animalis mutare non potest, neque efficere, ut id quod captum est, fiat prohibentis: alioqui non nuda prohibenti actio injuriarum pareret, l. 13 § *ult de injur.* sed rei vindicatio et condictio furtiva. Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De occupatione ferarum.

[1] Item feras bestias, quas vivariis incluserimus, et pisces, quos in piscinas coiecerimus, a nobis possideri. Sed eos pisces, qui in stagno sint, aut feras, quae in silvis circumseptis vagantur, a nobis non possideri, quoniam relictae sint in libertate naturali: alioquin etiam si quis silvam emerit, videri eum omnes feras possidere, quod falsum est. Dig. xli. 2. 3. 14, (Nerva filius).

There has been some difference of opinion among the commentators and glossators as to whether 'silvis circumseptis' is a correct reading, or whether it should rather be "silvis non circumseptis" (in unenclosed woods). Gothofred, Hotomann, Wesembec, and Noodt are of opinion that the latter reading should be adopted; but Vinnius, Pothier and Savigny adhere to the former.

fined in the chase."[1] There can be very little doubt, therefore that in the passage which I quoted from the Digest a few moments ago, the expressions 'park' (vivaria), and 'enclosed wood' (silva circumsepta) are used merely for the purpose of drawing a distinction between large and small enclosures.[2]

General principles of law regarding the same topic.—Apart from any special rule recognized by local custom[3] or declared by express legislation in the legal system of any country, the only rational test for determining whether in any particular case animals ferae naturae are possessed by us, so as to form the groundwork of criminal liability on the part of those who violate such possession, is to see whether there exists some special disposition (custodia) of such ferae naturae, which enables us actually to get them into our power whenever we wish. "We do not" says Sir W. Markby "possess the fish in a river, even though the river and the exclusive right of fishing in it, belongs to us. We do not even possess the fish in a pond if the pond be so large that the fish can escape from us, when we go to take them. But we do possess fish, when once they are placed in a stew or other receptacle, so small that we can at any moment go and take them."[4]

Provisions of the English Common law.—The provisions of the English Common law upon this branch of law are somewhat different from the rules of the Roman law just stated. According to that law, every owner of land has an exclusive right, ratione soli tenurae, to catch, kill and appropriate all such animals ferae naturae as may from time to time be found on his land. By a peculiar franchise, called the right of free warren, anciently granted by the Crown by virtue of its prerogative, one may also have an exclusive right, ratione privilegii, of killing and taking animals ferae naturae in the land of another. These special rights are the creatures of the game laws, which in England grew out of feudalism and the great forests of the Norman kings and nobility; and it is in the recognition of these exclusive rights in landowners and grantees from

[1] On Possession, Bk. iii, §. 33. note (p).

[2] *Ibid.*

[3] That local custom may modify the rule, is acknowledged by Vinnius; and he further observes that, in modern times the rule is somewhat different from that laid down by the ancient lawyers. Wild animals, he remarks, shut up in private woods (silvis privatis) and fishes shut up in lakes (stagnis) are so possessed by us that they are deemed to be in our ownership. See Vinnius, Comm. ad Inst. lib. ii. t. 1. text. De occupatione ferarum.

[4] Markby, Elements of Law (3rd ed), 183.

the Crown that the English Common law upon this matter takes its departure from the Roman law. Of course, they both agree, as they must of necessity do, in regarding animals ferae naturae, before capture, as res nullius, as not being in the ownership, still less in the possession, of any one. But as soon as they are caught or killed, they become under the English Common law, in case the exclusive right be claimed ratione soli, the property of the owner of the land upon which they are caught or killed, even though they are caught or killed by a stranger trespassing upon his soil, provided, however, they are both found and caught or found and killed within the limits of his land; and where the exclusive right is claimed ratione privilegii, they become the property of the owner of the privilege, if they are both found and caught or found and killed within the limits of the land over which his privilege extends.[1] If they are killed, they become the absolute property of the owner of the soil or of the grantee of the privilege; but if they are merely reclaimed, they become the subject of qualified property only, liable to be lost again in case they escape from his custody.[2]

Blades v. Higgs.—It is instructive to refer to the reasoning by which Lord Westbury, L. C., in *Blades* v. *Higgs*[3], supported the right of the owner of the soil to property in ferae naturae caught or killed by a trespasser; because a comparison of it with the argument advanced by Vinnius, which I have already quoted, will disclose the point of divergence of the premises which has led to such widely variant results in the two systems of law. His Lordship said:—"The question in the present case is, whether game found, killed, and taken upon my land by a trespasser becomes my property as much as if it had been killed and taken by myself, or by my servant by my authority. Upon principle, there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act; for it would be unreasonable to hold that the act of the trespasser,—that is, of a wrongdoer,—should divest the owner of the soil of his qualified property in the game, and give the wrongdoer an absolute right of property, to the exclusion of the rightful owner. But in game when killed and taken, there is absolute property in some one; and therefore the property in game found and taken by a tres-

[1] *Blades* v *Higgs*, 11 H. L. C. 621; 20 C. B. N. S. 214; *Regg* v. *The Earl of Londsdale*, 1 H. & N. 923.

[2] *Ibid.*

[3] 11 H. L. C. 621; 20 C. B. N. S. 214.

passer on the land of A. must vest either in A. or the trespasser: and, if it be unreasonable to hold that the property vests in the wrongdoer, it must of necessity be vested in A., the owner of the soil."

Liability of a trespasser for capture of ferae naturae.—But though animals ferae naturae caught or killed by a trespasser become the property of the owner of the soil on which they are found and caught or found and killed, the latter does not, under the Common law, thereby acquire legal possession of them, until the taker has parted with or has been deprived of his wrongful possession. Consequently, it has always been the rule at Common law that such wrongful taker is not indictable for the offence of trespass or larceny[1]; although no doubt, he may be liable in damages in a civil action of trespass.

If, however, such animals are enclosed in a park, or if fishes are confined in a pond, tank or stew so small, or if, by reason of their immaturity they are so powerless, that they can be taken at pleasure with certainty, they are deemed to be in the legal possession of the person who has the exclusive right to take them, and any one who violates such possession, and catches and appropriates them commits larceny.[2] But this rule has now been abrogated or modified in nearly all important cases by statutes.

24 and 25 Vict. c. 96, s. 24.—In this connection, it may be worth while to notice the provisions of section 24 of the Larceny Consolidation Act, 24 and 25 Vict. c. 96 (designed obviously for the purpose of supplementing the insufficiency of the Common law to protect private rights of fishery), as it is upon the lines of that section, it seems, that the Private Fisheries Protection Act (II of 1889) passed by the Bengal legislature has been to some extent framed.

The section runs thus:—

[1] *Reg.* v. *Petch*, 14 Cox, C. C., 116; *Reg.* v. *Read*, 14 Cox C. C., 17 *Reg.* v. *Townley*, L. R., 1 C. C., 315. Cp. *Blades* v. *Higgs*, 11 H. L. C., 621; 20 C. B. N. S. 214.

[2] *Grey's case*, Ow. 20; 1 Hale, Pl. C. 510, 511; East, Pl. C. 610; Paterson's Fishery Laws, 72; Pollock & Wright on Possession in Common Law, 231.

The degree of control over the object which is requisite to constitute possession may be illustrated by the case of *Young* v *Hitchens*, (6 Q. B. 606). The plaintiff had nearly enclosed a shoal of fish by a seine with an opening of seven fathoms between the ends, which he was proceeding to enclose with his stop-net, boats having been stationed at those ends to frighten them from escaping by the splashing of water. The defendant at this moment rowed in through the opening and took some of the fish. The Court of Queen's Bench held that the fish had been reduced to possession so as to entitle the plaintiff to maintain trespass.

"Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person, being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanour, punishable by the Common law with fine and imprisonment in addition to or in lieu of sureties; and whosoever shall unlawfully or wilfully take or destroy, or attempt to take or destroy any fish in any water not being such as hereinafter mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall on conviction thereof before a justice of the peace, forfeit and pay over and above the value of the fish taken or destroyed (if any), such sum of money not exceeding 5*l.* as to the justice may seem meet.

Provided that nothing hereinbefore contained shall extend to any persons angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset; but whosoever shall, by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, unlawfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall on conviction before a justice of the peace, forfeit or pay any sum not exceeding 2*l.* as to the justice may seem meet: and if the boundary of any parish, township, or vill shall happen to be in or by the the side of any such water as in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto."

Summary of the decisions upon the section.—This section has been held to extend to the illegal taking of fish in a several fishery, in tidal as well as in non-tidal waters;[1] and the word "unlawfully" used therein has been construed to mean,—without any claim or right or title in the offender such as can exist in law.[2] So that, if in any particular case such claim appears to the justices to be set up *bonâ fide*, and with some show of reason, their jurisdiction is ousted.[3]

Anglo-Indian law regarding ferae naturae.—Irrespective of certain

[1] *Paley* v. *Birch*, 8 B. & S. 336.

[2] *Hudson* v. *McRae*, 5 B. & S. 485; *Hargreaves* v. *Diddams*, L. R., 10 Q. B. 482; *Pearce* v. *Scotcher*, 9 Q. B. D. 162.

[3] *Leath* v. *Vine*, 30 L. J. M. C. 207; *Cornwell* v. *Saunders*, 32 L. J. M. C. 6; *Reg.* v. *Burrow*, 34 Justice of Peace, 53; Paley on Summary Convictions (5th ed.) 138, 139.

special enactments relating to the capture of some kind of wild animals, there does not exist in India any positive law or judicial authority declaring in whom the ownership of animals ferae naturae vests, if they are caught or killed by a stranger trespassing upon the soil of another. The question was raised in the Madras High Court in *Makath Unni Moyi* v. *Malabar Kandapunni Nair*[1], where it was contended in argument that the rule of the Civil law, which conferred ownership of the animal on the captor and not on the owner of the soil, ought to be followed in India as being consonant to the rule of equity and good conscience. But the learned judges unfortunately abstained from expressing any definite opinion upon this point, as under the circumstances of the case it was thought unnecessary to decide it; the capture of the animal having been, in their opinion, made virtually by the owner of the soil on which it was found.

As regards the legal possession of animals ferae naturae before capture, the Courts in India have uniformly acted upon the principle that the owner of the soil upon which they are found has none, unless they are confined in such a manner or stored or bred in such a place that they may be caught and taken by him at pleasure.

Cases in which capture of fish does not constitute any offence under the Indian Penal Code.—The point has been discussed chiefly for the purpose of determining whether persons catching and appropriating fish in rivers, lakes or tanks in which others have an exclusive right of fishery, thereby commit any criminal offence. It has been held that fish in flowing rivers, in lakes, in the open irrigation tanks, and even in closed tanks or reservoirs at a time when the floods are high, are not in the legal possession of any person, and that therefore any one who catches and takes fish from such places and under such circumstances is not guilty of theft, criminal trespass, criminal misappropriation or mischief as defined in the Indian Penal Code.[2] These decisions have in the Bengal Presidency been abrogated by a special enactment of the local legislatures, namely, Act II of 1889. But in all other parts of India they still continue to be applicable.

[1] I. L. R. 4 Mad. 268.

[2] *Bhagiram Dome* v. *Abar Dome*, I. L. R. 15 Cal. 388; *Mayaram Surma* v. *Nichala Katani*, Ibid., 402; *The Meherpur case*, Ibid., 390 (note); *The Queen* v. *Revu Pothadi*, I. L. R 5 Mad., 390; *Empress* v. *Charu Nayaiah*, I. L. R. 2 Cal. 354; *Bhusun Parui* v. *Denonath Banerjea*, 20 Suth. W. R. Cr., 15; *Kashi Chunder Dass* v. *Harkishore Dass*, 19 Suth. W. R. Cr. 47; *Khettur Nath Dutt* v. *India Julia*, 16 Suth W. R., Cr. 78.

Section 145 of the Criminal Procedure Code, how far applicable to rights of fishery.—The preventive jurisdiction of the Criminal Courts is also sometimes invoked, when disputes concerning rights of fishery become so serious as to threaten a breach of the peace. In such cases it has been held that if the fishery is a territorial one, that is to say, if it is claimed by virtue of the ownership of the soil, the Court may exercise its jurisdiction under section 145 of the Criminal Procedure Code (Act X of 1882), just as in the case of any other 'tangible immoveable property;' but if the right of fishery be of an incorporeal character, to be exercised or enjoyed over soil belonging to another person, the Court must deal with any dispute relating thereto, under section 147 of the same Code.[1] It may be worth while to note that there is much difference in the nature of the order to be passed according as the jurisdiction is exercised under one section or the other.

[1] *Anund Moyi Dabi* v. *Shurnomoyi*, I. L. R 13 Cal. 179; *Khrishna Dhone Dutt* v. *Troilokia Nath Biswas*, I. L. R. 12 Cal. 539. Cf. *Pramatha Bhusan Deb Roy* v. *Doorga Churn Bhuttacharjea*, I. L. R. 11 Cal. (413) 416; *Bejoy Nath Chatterjea* v. *Bengal Coal Co.*, 23 Suth. W. R. Cr. 45.

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APPENDIX.

REGULATION XI OF 1825.

A Regulation for declaring the Rules to be observed in determining Claims to Lands gained by Alluvion, or by Dereliction of a River or the Sea: Passed by the Governor-General in Council on the 26th May 1825.

Preamble.

I. In consequence of the frequent changes which take place in the channel of the principal rivers that intersect the provinces immediately subject to the presidency of Fort William, and the shifting of the sands which lie in the beds of those rivers, churs or small islands are often thrown up by alluvion in the midst of the stream, or near one of the banks, and large portions of land are carried away by an encroachment of the river on one side, whilst accessions of lands are at the same time, or in subsequent years, gained by dereliction of the water on the opposite side; similar instances of alluvion, encroachment, and dereliction also sometimes occur on the sea-coast which borders the southern and south-eastern limits of Bengal. The lands gained from the rivers or sea by the means abovementioned are a frequent source of contention and affray, and although the law and custom of the country have established rules applicable to such cases, these rules not being generally known, the Courts of Justice have sometimes found it difficult to determine the rights of litigant parties claiming churs or other lands gained in the manner above described. The Court of Sudder Dewanny Adawlut, with a view to ascertain the legal provisions of the Mahomedan and Hindoo laws on this subject, called for reports from their law officers of each persuasion, and on consideration of the reports furnished by the law officers in consequence, as well as of the decisions which have been passed by the Court of Sudder Dewanny Adawlut in cases brought before them in appeal which involved the rights of claimants to lands gained by alluvion, or by dereliction of rivers or the sea, the Governor-General in Council has deemed it proper to enact the following rules for the general information of individuals as well as for the guidance of the Courts of Judicature; to be in force, as soon as promulgated, throughout the whole of the provinces subject to the presidency of Fort William.

Claims and disputes relative to alluvial lands to be decided by immemorial and definite usage when such shall be clearly recognized and established.

II. Whenever any clear and definite usage of shikust pywust, respecting the disjunction and junction of land by the encroachment or recess of a river, may have been immemorially established, for determining the rights of the proprietors of two or more contiguous estates divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river, by encroachment on one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage.

III. Where there may be no local usage of the nature referred to in the preceding Section, the general rules declared in the following Section shall be applied to the determination of all claims and disputes relative to lands gained by alluvion or by dereliction either of a river or the sea.

Where no such local usage may be established, the claims to be decided, according to the following section.

IV. First. When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landholder, or as a subordinate tenure, by any description of under-tenant whatever. Provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation II, 1819, or of any other Regulation in force. [*Nor if annexed to a subordinate tenure held under a superior landholder, shall the under-tenant, whether a khoodkast ryot, holding a mouroosee istimraree tenure at a fixed rate of rent per beegah, or any other description of under-tenant liable by his engagements, or by established usage, to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable.**]

Lands gained by gradual accession from the recess of a river or the sea, to be considered an increment to the tenure of the person to whose estate it may be annexed.

Proviso.

Second. The above rule shall not be considered applicable to cases in which a river, by a sudden change of its course, may break through and intersect an estate, without any gradual encroachment, or may by the violence of stream separate a considerable piece of land from one estate, and join it to another estate, without destroying the identity, and preventing the recognition of the land so removed. In such cases the land, on being clearly recognised, shall remain the property of its original owner.

When a river by a sudden change of its course may break through and intersect an estate, the lands so separated being clearly recognized, shall remain the property of the original owner.

Third. When a chur, or island, may be thrown up in a large navigable river (the bed of which is not the property of an individual), or in the sea, and the channel of the river, or sea, between such island and the shore may not be fordable, it shall, according to established usage, be at the disposal of Government. But if the channel between such island and the shore be fordable at any season of the year, it shall be considered an accession to the land, tenure or tenures, of the person or persons whose estate or estates may be most contiguous to it, subject to the several provisions specified in the first clause of this section, with respect to increment of land by gradual accession.

Churs or islands thrown up in a large and navigable river (the channel between the island and the shore not being fordable), to be at the disposal of Government.

But if fordable, to whom they shall belong.

Fourth. In small and shallow rivers, the beds of which, with the julkur right of fishery, may have been heretofore recognized as the property of individuals, any sand-bank, or chur, that may be thrown up, shall, as hitherto, belong to the proprietor of the bed of the river, subject to the provisions stated in the first clause of the present section.

Claims to churs &c. thrown up in small and shallow rivers, how to be determined.

* Repealed by the Bengal Tenancy Act (VIII of 1885)

Fifth. In all other cases, viz., in all cases of claims and disputes respecting land gained by alluvion, or by dereliction of a river, or the sea, which are not specifically provided for by the rules contained in this Regulation, the Courts of Justice, in deciding upon such claims and disputes, shall be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or if not, by general principles of equity and justice.

Disputes relative to lands gained by alluvion or by dereliction of a river or the sea, not provided for by the provisions of the present Regulation, how to be adjusted.

V. Nothing in this Regulation shall be construed to justify any encroachments by individuals on the beds or channels of navigable rivers, or to prevent zillah and city magistrates, or any other officers of Government, who may be duly empowered for that purpose, from removing obstacles which appear to interfere with the safe and customary navigation of such rivers, or which shall in any respects obstruct the passage of boats by tracking on the banks of such rivers, or otherwise.

Encroachments on beds of navigable rivers and other obstructions to their free navigation prohibited.

ACT NO. IX. OF 1847.

An Act regarding the Assessment of Lands gained from the Sea or from Rivers by alluvion or dereliction within the Provinces of Bengal, Behar and Orissa: Passed by the Honourable the President of the Council of India in Council, on the 8th May, 1847 with the assent of the Right Honourable the Governor-General of India.

Preamble.

It is hereby enacted, that such parts of the Regulations of the Bengal Code as establish tribunals and prescribe rules of procedure for investigations regarding the liability to assessment of lands gained from the sea or from rivers by alluvion or dereliction, or regarding the right of Government to the ownership thereof, shall from the date of the passing of this Act cease to have effect within the provinces of Bengal, Behar and Orissa; and that all such investigations, pending before the collectors and deputy collectors in the said provinces at the said date, shall forthwith be discontinued; and that no measures shall hereafter be taken for the assessment of such lands, or for the assertion of the right of Government to the ownership thereof, except under the provisions of this Act.

"Orissa" defined.

II. And it is hereby enacted, that the expression "Province of Orissa" in this Act shall be taken to mean only so much of the Province of Orissa as is subject to the Government of Bengal.

Decennial survey to be made of lands subject to alluvion and dereliction by rivers or the sea.

III. And it is hereby enacted, that within the said Provinces, it shall be lawful for the Government of Bengal, in all districts or parts of districts, of which a revenue survey may have been or may hereafter be completed and approved by Government, to direct from time to time, whenever ten years from the approval of any such survey shall have expired, a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last previous survey, and to cause new maps to be made according to such new survey.

IV. And it is hereby enacted, that the approval of the revenue surveys of the following districts and parts of districts shall be deemed to have taken place on the undermentioned days, *viz.* :—

Dates of revenue surveys.

Of the district of Chittagong on the 6th September, 1842.

Of the district of Behar on the 9th November, 1844.

Of the district of Patna on the 22nd June, 1844.

Of the district of Shahabad on the 28th November, 1846.

Of the district of Sarun on the 18th February, 1847.

Of Pergunnah Furkyah, in the district of Monghyr, on the 19th September, 1839.

Of the Northern division of the province of Cuttack on the 24th October, 1842.

Of the central division of the province of Cuttack on the 22nd February, 1843.

Of the southern division of the province of Cuttack on the 19th October, 1842.

Of the district of Midnapore, except Hidgellee and Tumlook on the 12th September, 1845.

Of Hidgellee and Tumlook, in the district of Midnapore, on the 5th October, 1842.

Of the district of Cachar on the 5th February, 1844.

Of Jynteeah and the pergunnahs of Chapghat, Echamuttee, Ittisamnugger and Bhurrun, in the district of Sylhet on the 5th February, 1844.

Of the district of Gwalparah on the 24th December, 1842.

Of the district of Luckimpore on the 10th November, 1845.

Of the district of Seebpore on the 8th May, 1843.

And that the approval of the revenue surveys of districts or parts of districts which may be hereafter surveyed, shall be deemed to have taken place on such day as may be specified as the day of such approval in the Calcutta Government Gazette.

V. And it is hereby enacted, that whenever, on inspection of any such new map, it shall appear to the local revenue authorities that land has been washed away from or lost to any estate paying revenue directly to Government, they shall without loss of time make a deduction from the sudder jumma of the said estate equal to so much of the whole sudder jumma of the estate as bears to the whole the same proportion as the Mofussil jumma of the land lost bears to the Mofussil jumma of the whole estate; but if the Mofussil jumma of the whole estate, or of the land lost, cannot be ascertained to the satisfaction of the local revenue authorities, then the said local revenue authorities shall make a deduction from the sudder jumma of the estate equal to so much of the whole sudder jumma of the estate as bears to the whole the same proportion as the land lost bears to the whole estate. And this deduction, with the reasons thereof, shall be forthwith reported by the local revenue authorities for the information and orders of the Sudder Board of Revenue, whose orders thereupon shall be final.

How the jumma is to be reduced when lands have been washed away.

VI. And it is hereby enacted, that whenever, on inspection of any such new map, it shall appear to the local revenue authorities that land has been added to any estate paying revenue directly to Government, they shall without delay assess the same with a revenue payable to Government according to the rules in force for assessing alluvial increments, and shall report their

How lands acquired by dereliction are to be assessed.

proceedings forthwith to the Sudder Board of Revenue, whose orders thereupon shall be final.

How islands thrown up in large rivers are to be assessed.

VII. [*And it is hereby enacted, that whenever, on inspection of any such new map, it shall appear to the local revenue authorities that an island has been thrown up in a large and navigable river . liable to be taken possession of by Government under Clause third, Section 4, Regulation XI of 1825, of the Bengal Code, the said local revenue authorities shall take immediate possession of the same for Government and shall assess and settle the land according to the rules in force in that behalf, reporting their proceedings forthwith for the approval of the Sudder Board of Revenue, whose orders thereupon in regard to the assessment shall be final. Provided, however, that any party aggrieved by the act of the revenue authorities in taking possession of any island as aforesaid shall be at liberty to contest the same by a regular suit in the Civil Court.**]

This Act not to affect certain pending and appealable suits.

VIII. [*And it is hereby enacted, that nothing in this Act contained shall affect suits for the assessment or for establishing the right of Government to the ownership of alluvial lands now pending in appeal before the Special Commissioners, or such as, having been decided by the lower resumption Courts, are at the date of the passing of the Act open to appeal to the Court of the Special Commissioners according to the laws heretofore in force; and that all such cases shall be dealt with as if this Act had not been passed.*†]

What suits may be against Government under this Act.

IX. And it is hereby enacted, that, except as regards the proprietary right to islands, no suit or action in any Court of Justice shall lie against the Government, or any of its officers, on account of anything done in good faith in the exercise of the powers conferred by this Act.

ACT NO. XXXI OF 1858.

An Act to make further provision for the settlement of land gained by alluvion in the Presidency of Fort William in Bengal.

WHEREAS, for the removal of doubts respecting the course proper to be followed in the settlement of land added by alluvial accession to estates paying revenue to Government, it is expedient to lay down certain rules to be observed in the settlement of such land; It is enacted as follows:—

In what case the revenue assessed upon alluvial land may be added to the jumma of the original estate.

I. When land added by alluvial accession to an estate paying revenue to Government becomes liable to assessment, if it be so agreed on between the Revenue authorities and the proprietor or proprietors, the revenue assessed upon the alluvial land may be added to the jumma of the original estate; and in such case a new engagement shall be executed for the payment of the aggregate amount, and that amount shall be substituted in the Collector's rent-roll for the former jumma of the original estate. If the proprietor or proprietors object to such an arrangement, or if the revenue authorities are of opinion that a settlement of the alluvial land cannot properly be made for the same term as the existing settlement of the original estate, the alluvial land shall be assessed and settled as a separate

In what cases there shall be a separate settlement.

* Repealed by Act IV of 1868 (B. C.), Sec. 1. † Repealed by Act XIV of 1870.

estate with a separate jumma, and shall thenceforward be regarded and treated as in all respects separate from and independent of the original estate, whether the separate settlement be made with the proprietor or proprietors, or the land be let in farm in consequence of the refusal of the proprietor or proprietors to accept the terms of settlement. The separate settlement may be permanent, if the settlement of the original estate be permanent.

Rights of under-tenants in alluvial land.

II. Nothing contained in the preceding Section shall affect the rights of any under-tenant in any alluvial land under the provisions of Clause 1, Section 4, Regulation XI, 1825. It shall be the duty of all officers making settlements of such land, whether the land be settled separately or incorporated with the original estate, to ascertain and record all such rights according to the rules prescribed in Regulation VII, 1822; and to determine whether any and what additional rent shall be payable in respect of the alluvial land by the person or persons entitled to any under-tenure in the original estate. The provisions of the said Regulation, so far as the same may be applicable, are hereby declared to extend to all settlements made under this Act.

Separate settlements of alluvial lands heretofore made.
Proviso.

III. Every separate settlement of alluvial land heretofore made shall be as good and effectual for the purposes specified in Section 1, as the same would have been if made subsequently to the passing of this Act. Provided that nothing contained in this Act shall be held to affect the rights which any person may have acquired, under a judicial decision or otherwise, before the passing of this Act.

ACT NO. IV OF 1868. (B. C.)

Passed by the Lieutenant-Governor of Bengal in Council. (Received the assent of the Lieutenant-Governor on the 8th June, 1868, and of the Governor-General on the 24th idem.)

An Act to amend the provisions of Act IX of 1847 (an Act regarding the assessment of lands gained from the sea or from rivers by alluvion or dereliction within the Provinces of Bengal, Behar and Orissa).

Preamble.

WHEREAS it is expedient to amend the provisions of Act IX of 1847; it is enacted and declared as follows:—

Repeal of the Section.

I. Section 7 of the said Act IX of 1847 is hereby repealed.

Accessions to island to be considered increment thereto.

II. It is hereby declared that when any island shall, under the provisions of clause 3, Section 4 of Regulation XI of 1825 of the Bengal Code, be at the disposal of Government, all lands gained by gradual accession to such island, whether from a recess of the river or of the sea, shall be considered an increment to such island, and shall be equally at the disposal of Government.

Newly thrown up islands to be assessed.

III. Whenever it shall appear to the local Revenue authorities that an island has been thrown up in a large and navigable river liable to be taken possession of by Government under Clause 3, Section 4 of Regulation XI of 1825 of the Bengal Code, the local Revenue authorities shall take immediate

possession of the same for Government, and shall assess and settle the land according to the rules in force in that behalf, reporting their proceedings forthwith for the approval of the Board of Revenue, whose order thereupon, in regard to the assessment, shall be final. Provided, however, that any party aggrieved by the act of the Revenue authorities in taking possession of any island as aforesaid, shall be at liberty to contest the same by a regular suit in the Civil Court.

Subsequent junction to mainland not to affect Government right.

IV. Any island of which possession may have been taken by the local Revenue authorities on behalf of the Government under Section 3 of this Act, shall not be deemed to have become an accesssion to the property of any person by reason of such channel becoming fordable after possession of such island shall have been so taken.

Power to apply for ways across islands.

V. Whenever an island, of which possession shall have been taken by Government under Section 3 of this Act, shall become attached to the mainland, any person having an estate or interest in any part of the riparian mainland to which such island may become attached while it is in the possession of the Government, may apply to the Collector to take measures for the construction of ways, paths and roads on the island; the costs thereof to be equally divided between the applicant and the Government.

Applicant for ways to deposit money, and ways to be made.

VI. Thereupon the Collector may require the applicant to make such deposit of money as to the Collector shall seem sufficient, and on such deposit being made, the Collector shall proceed to lay out and construct such ways, paths and roads in and through the island as he may deem necessary for securing access to the river or sea from the land to which the island may have become attached.

Costs of ways how to be borne.

VII. In every case the applicant shall be liable to pay and make good to the Government one-half of the costs of laying out and constructing such ways, paths and roads as aforesaid, and any moneys due from the applicant under the provisions of this Section may be deducted and retained by the Collector out of the deposit so made by the applicant as aforesaid.

Ways to be public.

VIII. Every way, road, and path, which shall be laid out or appointed under the provisions aforesaid, shall be deemed a public highway.

THE INDIAN ALLUVION BILL, 1881.

A Bill to define and amend the law relating to alluvion, islands and abandoned river-beds.

Whereas it is expedient to define and amend the law relating to alluvion, islands and abandoned river-beds; It is hereby enacted as follows:—

1.—*Preliminary.*

Short title.

Local Extent.

Commencement.

1. This Act may be called "The Indian Alluvion Act, 1882":

It extends to the whole of British India;

and it shall come into force on the *first* day of March, 1882.

2. The Acts, Regulation and Rules mentioned in the first schedule hereto annexed, shall be repealed to the extent specified in the third column. Reference to the Regulation and Rules so repealed, in enactments passed subsequently thereto, shall be read as if made to this Act.

Repeal of enactments.

Interpretation-clause.

3. In this Act.—

"island" means land surrounded by water and capable of being employed for cultivation, pasture or other useful purpose. It includes such land arising in a river or lake, submerged in the wet season and visible only in the dry season; but it excludes land arising in tidal rivers, tidal lakes or the sea, submerged by the flow of ordinary tides throughout the year:

[N. B. W. R. 231; 4 W. R. 41; 4 W. R. 352.]

"frontage" used with reference to a holding means the line or lines determined for such holding in the manner prescribed in the second schedule hereto annexed:

and a channel is said to be "fordable" when it does not exceed five feet in depth in the dry season next after the formation referred to and through out the twenty-four hours.

[N B. 3 W. R 95; 6 Ben. 343.]

II. *Alluvial Land and Abandoned River-beds.*

Right to alluvial land formed on bank or shore.

4. Where from natural causes land is formed, by imperceptible degrees, on the bank or shore of a river, the sea or a lake, either by accumulation of material or by recession of the river, sea or lake, the owner of the bank or shore is entitled to the land so formed.

When the formation takes place at the junction of two holdings, each owner shall be entitled to so much of the formation as lies on his side of a line drawn through the point of junction and bisecting the angle between the two frontages at that point.

Right to islands where neither channel is fordable.

5. Where an island is formed, from natural causes, in a river, the sea or a lake, either by accumulation of material or by recession of the river, sea or lake, if the island is separated from each bank or shore by a channel not fordable at any point, the Government is entitled to such island.

[N. B. Ben. Act IV of 1868, s. 4.]

Islands where one or both channels fordable.

6. Where an island is formed from natural causes in a river, the sea or a lake, either by accumulation of material or by recession of the river, sea or lake, and is separated from the bank or banks by a fordable channel or fordable channels:

Land formed by perceptible degrees.

and where from natural causes any land is formed, otherwise than by imperceptible degrees, on the bank of a river, the sea or a lake, either by accumulation of material or by recession of the river, sea or lake,

and when a river suddenly abandons its bed,

[N. B. W. R. 1864, p. 103.]

each particle of the island or land so formed, or the river-bed so abandoned, shall belong to that one of the riparian owners who can show a point on the frontage of his holding nearest to such particle:

Provided that when the channel separating an island so formed in a river from one bank is fordable and the channel separating such island from the other bank is not fordable, the owners of the former bank shall alone be entitled as such to the island:

Provided also that when the line dividing the formation to which one owner is entitled under this section from the formation to which another owner is entitled under this section is an arc of a curve, the chord of such arc shall be substituted therefor.

III.—*Miscellaneous.*

Power to declare where tidal rivers end.

7. The Local Government may, from time to time, declare, with reference to any tidal river, where, for the purposes of this Act, the river shall be deemed to end and the sea to begin.

Every declaration made under this section shall be published in the Official Gazette, and shall thereupon have the force of law. And no such declaration shall be cancelled or altered save with the previous sanction of the Governor-General in Council.

Savings.

8. Nothing herein contained shall—

(a) affect any law relating to the assessment of land-revenue or the enhancement or abatement of rent; or

[Reg XI of 1825, s. 4.]

(b) confer on any owner of a bank or shore in respect of which he is hereby declared to be entitled to alluvial land, to an island, or to an abandoned river-bed, any title to such land, island or river-bed, better than that which he has in the bank or shore, or

[Reg. XI of 1825, s. 4.]

(c) enlarge any holding granted by Government, the area of which has been fixed by any sanad or other document executed under the authority of Government; or

[Bombay Revenue Code, s. 104, clause (3).]

(d) authorise any acts of private persons done in order to divert currents or cause accretions; or

(e) authorise any encroachments by private persons on the banks, beds or channels of navigable rivers; or

[Beng. Reg. XI of 1825, s. 5.]

(f) prevent any officer duly empowered by the Local Government in this behalf from removing obstacles which appear to him to interfere with the safe and customary navigation of such rivers, or which obstruct the passage of boats by tracking on the banks of such rivers or otherwise; or

[Beng Reg. XI of 1825, s. 5.]

(g) prevent any officer duly empowered by the Local Government in this behalf from regulating the direction and flow of such rivers and the preservation and distribution of their waters; or

(h) affect the right of the Government or a private owner—

to land formed on a site which is proved to belong to the Government or such owner; or

to the ancient bed of a river which is proved to have belonged to the Government or such owner, immediately before its abandonment.

Local usage saved.

9. Nothing herein contained shall affect any definite and well-established local usage respecting the right to alluvial land, islands or abandoned river-beds; but (except in the cases provided for by the Panjab Land-Revenue Act, 1871, section 16) the burden of proving such usage shall lie on the person alleging it.

[Reg. XI of 1825, s. 2; 13 Moo. I. A. 1; *contra* Oudh Taluqdárs, No. 3.]

Right of Crown to alluvial lands, &c., not hereinbefore provided for.

10. All land and islands formed, and all river-beds abandoned, as mentioned respectively in sections four and five, and not vesting under any of the provisions hereinbefore contained, shall vest in the Government.

[*e. g.* islands *not* formed from natural causes].

THE FIRST SCHEDULE.

Repeal of Enactments and Rules.

THE SECOND SCHEDULE.

Rules for determining the frontage of a holding.

(1) Draw a right line connecting the extreme points of the riparian boundary of the holding, and take that as the frontage, except—

(a) when such line or any portion of it lies altogether outside the riparian boundary of the holding, and any point on such line or portion, measuring along a perpendicular to it erected at such point, is further from such boundary than from the riparian boundary of any other holding; or

(b) when such line or any portion of it lies altogether within the riparian boundary of the holding, and there is any point on the portion of such boundary cut off by it so situated that right lines drawn from it to the extremities of such line or portion, as the case may be, contain an angle of less than 160°;

in either of which cases the line or portion of the line, as the case may be, must be rejected, and other lines substituted for it as follows:—

2. When the line or any portion of it is rejected on the ground mentioned in paragraph *(a)*, the lines to be substituted for it are to be determined as follows:—

Erect a perpendicular to it at its middle point: connect its extremities with the point where such perpendicular intersects the riparian boundary, and take those connecting lines as the frontage along that portion of the boundary, unless it should be found that there is a point on either of them which, measuring along the perpendicular to it erected at such point, is further from the riparian boundary of the holding than from the riparian boundary of any other holding, in which case that line must be rejected, a perpendicular to it erected at its middle point, and right lines drawn from its extremities to the point where that perpendicular intersects the riparian boundary of the holding, and so on, repeating the process, until such a series of right lines is obtained that no point on any one of them, measuring along the perpendicular erected to it at such point, will be further from the riparian boundary of the holding than from the riparian boundary of any other holding.

3. Where any line or portion of a line is rejected on the ground stated in paragraph *(b)*, the lines to be substituted for it are to be determined as follows:—

Erect a perpendicular to it at its middle point: connect its extremities with the point where such perpendicular intersects the riparian boundary, and take those connecting lines as the frontage along that portion of the boundary, unless it should be found that right lines drawn from the extremities of either of them to any point on the portion of the boundary cut off by it contain an angle of less than 160°, in which case that connecting line must be rejected, a perpendicular erected at its middle point, its extremities connected with the point where such perpendicular intersects the boundary, and so on, repeating

the process, until such a series of right lines is obtained that the right lines connecting the extremities of any one of them with any point on the portion of the boundary cut off by it will, in no case, be less than 160°.

ACT II OF 1889 (B.C.)

Passed by the Lieutenant-Governor of Bengal in Council.

[Received the assent of His Honor on the 15th May, 1889 and of His Excellency the Viceroy and Governor-General on the 15th June, 1889.]

An Act for the protection of the right of fishing in private waters.

Preamble.

WHEREAS it is expedient to provide for the protection of private rights of fishery:

It is hereby enacted as follows:—

Short title.

1. This Act may be called the "Private Fisheries Protection Act, 1889."

Interpretation-clause.

2. In this Act—

"Fish"

"Fish" includes shell-fish and turtles.

"Fixed engine" means any net, cage, trap, or other contrivance for taking fish, fixed in the soil or made stationary in any other way.

"Private Waters."

"Private waters" means waters—

(a) which are the exclusive property of any person; or

(b) in which any person has an exclusive right of fishery,

and in which fish are not confined but have means of ingress or egress.

3. Any person who—

Penalties.

(a) fishes in any private waters not having a right to fish therein:

(b) erects, places, maintains or uses any fixed engine in private waters, or puts, or knowingly permits to be put therein, any matter for the purpose of catching or destroying fish without the permission of the person to whom the right of fishery therein belongs;

shall be guilty of an offence, and shall be punished for a first offence with a fine not exceeding fifty rupees;

and for a subsequent offence with imprisonment which may be simple or rigorous, for a term not exceeding one month, or with a fine not exceeding two hundred rupees, or both:

Provided that nothing herein contained shall apply to acts done by any person in the exercise of a *bonâ fide* claim of right, or shall prevent any person from angling with a rod and line, or with a line only in any portion of a navigable river.

Forfeiture of fixed engines.

4. (1) Any fixed engine erected, placed, maintained, or used in contravention of the last preceding section, and any fish taken by means of such engine, or otherwise in contravention of this Act, shall be forfeited.

(2) And such fixed engine may be removed or taken prossession of by the Magistrate of the district, or such person as he empowers in this behalf.

Entry upon the land of another or upon private waters with intent to commit an offence.

5. Whoever enters upon land in the possession of another or upon private waters with intent to commit any of the offences specified in section three, shall be punished with a fine not exceeding fifty rupees.

Offences under this Act considered "cognizable offences."

6. Offences committed under this Act shall be considered to be "cognizable offences" as defined in the Code of Criminal Procedure.

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